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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 13(b) of the Public Utility Holding Company Act, 15 U.S.C. § 79m(b), which authorizes the Securities and Exchange Commission (SEC) to authorize certain contracts among associate companies of registered public utility holding companies, ousts the Federal Energy Regulatory Commission (FERC) of its core authority to determine the justness and reasonableness of fuel charges an electric utility can include in wholesale rates solely because the utility purchases its fuel through affiliate contracts subject to SEC jurisdiction.

2. Whether the court of appeals erred by failing to defer to FERC's reasonable and consistently applied interpretation of its own regulation and by instead construing the regulation in a manner that divests the FERC of any discretion to examine the justness or reasonableness of fuel costs that are "subject to the jurisdiction of [another] regulatory body."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 954 F.2d 779 (D.C. Cir. 1992). The court of appeals denied rehearing on April 14, 1992 (App., *infra*, 16a-17a). The decision of the Federal Energy Regulatory Commission (FERC) (App., *infra*, 18a-54a) is reported at 39 F.E.R.C. ¶ 61,098 (1987). The decision of the FERC denying rehearing (App., *infra*, 55a-60a) is reported at 43 F.E.R.C. ¶ 61,046 (1988).

JURISDICTION

The court of appeals rendered its judgment on February 4, 1992. Rehearing was denied on April 14, 1992. By order dated July 6, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 12, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The relevant statutory and regulatory authorities are Section 13(b) of the Public Utility Holding Company Act, 15 U.S.C. § 79m(b) (App., *infra*, 61a), Section 318 of the Federal Power Act, 16 U.S.C. § 825q (App., *infra*, 61a), and Section 35.14(a)(7) of FERC's regulations, 18 C.F.R. § 35.14(a)(7) (1992) (App., *infra*, 62a).

STATEMENT

1. Petitioners are fifteen small Ohio villages and cities that purchase wholesale electric power from respondent Ohio Power Company for resale to their residents.[1] Ohio Power is an operating public utility subsidiary of the American Electric Power Company (AEP), which also owns seven other electric utilities operating as an interconnected system in a seven-state area. Because AEP is a registered public utility holding company, Ohio Power is subject to Titles I and II of the Public Utility Act of 1935, ch. 687, 49 Stat. 803.

Title I of that Act created the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 79 *et seq.*, which subjects public utility holding companies and their affiliates to regulation by the Securities and Exchange

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[1] Petitioners include the Villages of Arcadia, Bloomdale, Carey, Cygnet, Deshler, Greenwich, Ohio City, Plymouth, Republic, Shiloh, Sycamore and Wharton, and the Cities of Bryan, St. Clairsville and Wapakoneta. Petitioners have populations ranging from approximately 300 to 8500.

Commission (SEC). Title II of the Act enacted Part 2 of the Federal Power Act (FPA), 16 U.S.C. § 824 *et seq.*, which authorized the Federal Power Commission, now FERC, to regulate the transmission and sale of electric energy by public utilities.

Ohio Power purchases coal for generating electricity from the Southern Ohio Coal Company (SOCCO), a wholly owned subsidiary it capitalized in 1971. Under PUHCA, Ohio Power was required to obtain the SEC's approval to finance some of SOCCO's operations. As the court of appeals observed in its initial decision in this case, the SEC conducted no hearings and made no specific findings prior to approving Ohio Power's investment in SOCCO. *Ohio Power Co.* v. *FERC*, 880 F.2d 1400, 1404 (D.C. Cir. 1989), *rev'd and remanded sub nom. Arcadia* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990). In the course of its brief order approving the capitalization, the SEC staff simply "noted that, under the proposal before it, SOCCO's charges to [Ohio Power] would be 'based on' its actual costs plus a rate of return." *Id.*

Between 1978 and 1980, the SEC staff approved three additional transactions between SOCCO and Ohio Power authorizing further financing for SOCCO's mining operations.[2] In each of these orders, the SEC staff "adverted briefly to the contractual relation between the associates," *id.*, noting in each that the price at which SOCCO's coal would be sold to Ohio Power "will not exceed the cost" to SOCCO. *Id.* (quotation omitted). Consistent with its cursory examination of Ohio Power's relationship with SOCCO, "[n]one of the [Commission staff's four orders cites section 13 [of PUHCA], nor mentions expressly whatever purchase agreement exists between SOCCO and [Ohio Power], nor describes any element of costs other

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[2] *See In re Ohio Power Co.*, 14 S.E.C. Docket 928 (1978); *In re Southern Ohio Coal Co.*, 17 S.E.C. Docket 310 (1979); *In re Southern Ohio Coal Co.*, 19 S.E.C. Docket 1309 (1980).

than the cost of capital." *Id.* at 1408.[3] None, moreover, specifically approved the contract by which Ohio Power purchases coal from SOCCO and none required Ohio Power to purchase *any* SOCCO coal.

2. In 1982, FERC responded to Ohio Power's filing of a wholesale rate increase by initiating proceedings under Sections 205 and 206 of the FPA, 16 U.S.C. § 824d & 824e, to determine whether the proposed rates were just and reasonable. Acting under its mandate to protect ratepayers from excessive charges, FERC disallowed that portion of Ohio Power's SOCCO coal costs[4] that did not satisfy the agency's "comparable market test."

Under the comparable market test, first announced in *Public Serv. Co. of New Mexico*, 17 F.E.R.C. ¶ 61,123 (1981), *aff'd in relevant part sub nom. Public Serv. Co.* v. *FERC*, 832 F.2d 1201 (10th Cir. 1987), utilities purchasing coal from affiliates may "recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." *Id.* at 61,246. As FERC explained in disallowing Ohio Power's excessive coal costs, the comparable market test serves two important purposes: First, it "provides the best incentive for utilities to develop the least costly sources of fuel." App., *infra*, 29a-30a. Second, it protects consumers from the risks of "self-dealing" and "rate manipulation" that "arise[] in transactions between affiliates." *Id.* at 30a. In this case, FERC found that Ohio Power had paid approximately 50 percent more than the market price for coal in 1980, approximately 94 percent more

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[3] Section 13(b) of PUHCA is set forth, in relevant part, *infra* p. 17.

[4] Coal costs are the dominant component in the total cost of the power petitioners purchase from Ohio Power, accounting for nearly half of Ohio Power's revenues from its sales to petitioners. *See* Ohio Power Co., Revised Compliance Filing, Docket No. ER82-553-004 (FERC Apr. 24, 1989).

than the market price in 1981, and, following FERC's commencement of rate proceedings, approximately 24 to 33 percent more than market price from 1983 to 1986. App., *infra*, 45a & n.87.

Ohio Power contended that Section 318 of the FPA placed the coal charges it passes on to its consumers entirely beyond FERC's jurisdiction. Entitled "Conflicts of Jurisdiction," Section 318 provides that

> [i]f, with respect to the issue, sale, or guaranty of a security, . . . or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of [the FPA] . . . and to a requirement of [the PUHCA], the requirement of [the PUHCA] shall apply to such person, and such person shall not be subject to the requirement of [the FPA] . . . with respect to the same subject matter.

16 U.S.C. § 825q. According to Ohio Power, Section 13(b) of PUHCA and relevant SEC regulations required it to pay SOCCO the "costs" of producing coal, including salaries and a return on investment, even if those costs were considerably higher than comparable market prices. Thus, Ohio Power argued, notwithstanding FERC's statutory mandate to ensure that wholesale rates are just and reasonable, SEC regulation of Ohio Power's coal contracts precluded FERC from regulating the coal costs the utility includes in its wholesale rates.

FERC rejected this construction of Section 318. It observed that the SEC's jurisdiction under PUHCA does not extend to setting rates, as the SEC itself has repeatedly acknowledged. App., *infra*, 25a-27a. For purposes of Section 318, FERC ruled, the relevant "subject matter" of SEC regulation under PUHCA is the transfer price of coal between SOCCO and Ohio Power, not the "fuel costs Ohio Power may collect from its wholesale customers." App., *infra*, 24a-25a. FERC concluded that, because "setting the intra-corporate price and setting rates are not the same subject matter" for purposes of Section

318, there was no conflict between its regulatory efforts and those of the SEC and, hence, Section 318 did not oust it of jurisdiction. *Id.* FERC therefore ordered Ohio Power to establish rates that recover from its customers no more than the comparable market price of coal, and to refund prior overcharges that ultimately totaled approximately $10 million (App., *infra*, 53a), which Ohio Power subsequently did.

3. A divided court of appeals reversed. The court did not question the propriety of FERC's comparable market test or dispute the Commission's finding that, between 1980 and 1986, Ohio Power had passed on to its customers the excessive coal prices paid to its subsidiary. Nor did the court dispute that the SEC lacks ratemaking authority, does not regulate the fuel charges that utilities subject to PUHCA may pass on to their consumers, and did not specifically approve the contract by which Ohio Power purchased its coal from SOCCO. Rather, the panel majority concluded that Section 318 completely ousts FERC of jurisdiction to regulate the fuel charges a utility may include in its wholesale rates whenever the SEC has any jurisdiction over the contracts under which the utility purchases such fuel.

In so ruling, the panel majority employed a broad "field preemption" analysis with respect to the jurisdictional overlaps arising under PUHCA and the FPA. The majority presumed that Congress "had conferred on the SEC jurisdiction over some non-enumerated matters that otherwise would fall within the jurisdiction of FERC, and . . . therefore included the residuary phrase [*i.e.*, "any other subject matter"] to govern those conflicts." *Ohio Power Co.* v. *FERC*, 880 F.2d at 1406. "The price term of sales contracts between associated companies . . . subject to SEC jurisdiction under PUHCA," the majority held, is such a non-enumerated "subject matter" under Section 318. *Id.* Because, in the majority's view, "FERC has in effect set by order a different price term for such a contract by determining that it will not allow the contract

price as a cost in [Ohio Power's] rate[s,] . . . [t]he conclusion that the same subject matter is implicated is inescapable." *Id.* The majority ruled, moreover, that Section 318 divests FERC of its otherwise exclusive jurisdiction over wholesale rates even if the FERC order and the SEC regulation pose no actual conflict. *Id.* at 1408.[5]

4. This Court granted a petition for certiorari filed by the Ohio municipalities and reversed. In a unanimous opinion, the Court rejected the court of appeals' determinaton that Section 318 serves as a "general conflicts provision, policing the entire regulatory border between the [SEC and FERC]." *Aracadia* v. *Ohio Power Co.*, 111 S. Ct. 415, 421 (1990). Rather, the Court read Section 318 to oust FERC of its jurisdiction only where "the 'same subject matter' as to which the duplicative [FERC and SEC] requirements exist [is] one of those specifically enumerated" in Section 318. *Id.*

So interpreted, the Court concluded, Section 318 does not divest FERC of its jurisdiction. "The combination of SEC requirements with respect to the acquisition of SOCCO [or its coal] and FERC requirements with respect to the disposition of electric power," the Court explained, "would not bring § 318 into play." *Id.* at 422. Even assuming FERC's rate order is a requirement falling within one of the four enumerated areas specified by Section 318, "it is still a requirement with respect to a *different* subject matter from (and not, as § 318 requires, 'with respect to the same subject matter' as)" the SEC orders concerning the acquisition of SOCCO or its coal. *Id.* The Court remanded the case for a determination

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[5] Judge Mikva dissented from this part of the majority's opinion. He argued that Section 318 does not grant the SEC exclusive jurisdiction over all costs arising from a contract subject to PUHCA. He concurred in the decision to set aside FERC's order on the ground that, notwithstanding FERC's contrary interpretation, Rule 35.14(a)(7) of FERC's own rules precludes FERC from disallowing any costs approved by the SEC.

whether, as Judge Mikva had concluded, FERC had violated its own regulation, or whether the FERC-prescribed rate is not just and reasonable within the meaning of the FPA because it might "trap" costs. *Id.*

Concurring in the Court's interpretation, Justice Stevens, joined by Justice Marshall, wrote separately to explain that there was no actual conflict between the two agencies' orders. Moreover, Justice Stevens noted, "the Court of Appeals' reading of § 318 would create a gap in the regulatory scheme that Congress could not have intended." *Id.* at 423. In this case "Ohio Power would be allowed to buy coal at prices that would be higher than those paid by any utility not owned by a holding company, and then pass those higher costs along to its customers" without any scrutiny by the agency whose "principal goal[] is to ensure that the rates customers pay for their electricity are 'just and reasonable.'" *Id.* This arrangement is completely inconsistent with Congress' intent that PUHCA "supplement not supplant the FPA" (*id.*) and that utilities owned by holding companies "be subject to the regulation of both the SEC and FERC as much as practical." *Id.* at 424.

5. On remand, the court of appeals once again invalidated FERC's order. The Court concluded that FERC's own regulation, § 35.14(a)(7), precludes the Commission from examining the propriety of costs included in wholesale rates where those costs are subject to SEC approval. Section 35.14(a)(7) provides that fuel costs "which [are] subject to the jurisdiction of a regulatory body . . . shall be deemed to be reasonable and includable in the [fuel] adjustment clause" without prior FERC review or approval. 18 C.F.R. § 35.14(a)(7) (1992). The FERC had ruled that this language merely "creates a *presumption* of reasonableness, not a conclusive finding of reasonableness." App., *infra*, 28a (emphasis added). Relying on interpretations of unrelated statutes, the court of appeals

concluded that the term "deemed" must be read to create a conclusive presumption and that FERC's contrary interpretation was therefore entitled to no deference. App., *infra*, 8a-9a. Brushing aside FERC's prior interpretations, the court found that the plain language of the regulation "requires FERC to include in Ohio Power's wholesale rate the SEC-approved cost-based price for SOCCO coal." App., *infra*, 9a.

Although its interpretation of Section 35.14(a)(7) provided Ohio Power "with some succor from the overlapping regulatory jurisdiction of both the SEC and of FERC," App., *infra*, 10a, the court recognized that FERC could readily revise its regulation. App., *infra*, 9a. It therefore decided whether the regulatory efforts of the SEC and FERC created an irreconcilable conflict and, if so, which agency's authority is paramount. The lower court answered the first of these questions affirmatively, reasoning that, by disallowing a portion of Ohio Power's coal price from its wholesale rate, FERC was "undeniably affecting the economic relationship between Ohio Power and SOCCO" that the SEC had approved. App., *infra*, 11a. The resolution of this "conflict," the court ruled, depends upon the plain language of Section 13(b) of PUHCA, which empowers the SEC "to approve the price of inter-associate sales of goods, such as coal, and directs the SEC to price these goods 'at cost, fairly and equitably allocated among [associated] companies.'" *Id.* Invoking the canon of construction that specific statutory provisions take precedence over more general provisions, the court concluded that "the SEC's specific statutory mandate to establish a cost-based price" necessarily trumps FERC's "general charge to establish 'just and reasonable' wholesale electric rates." *Id.* The court thus held that Section 13(b) of PUHCA affirmatively "constrain[s] FERC from altering [an SEC-approved] price under its 'just and reasonable' rate-setting authority." App., *infra*, 12a.

The court rejected FERC's contention that, as Justice Stevens had concluded, the two agency orders could coexist because the SEC order simply set at most a ceiling on the amount Ohio Power could pay for SOCCO coal. The court also ignored its earlier recognition that the SEC had not been "particularly mindful of its statutory powers and obligations under section 13(b)" when issuing its orders and had not "describe[d] any element of [SOCCO's] costs other than the cost of capital." *Ohio Power Co.* v. *FERC*, 880 F.2d at 1408. Accordingly, the court concluded that, because "Congress's use of the term 'at cost' indicates that cost serves as a ceiling and a floor," App., *infra*, 13a, the SEC staff orders "are better read" as requiring Ohio Power to pay no more or less than cost to SOCCO for its coal. App., *infra*, 14a. Thus, the fact that FERC's market-based price may not have exceeded SOCCO's cost was, in the court's view, irrelevant: "To the extent there is downward flexibility in a cost-based price, . . . Congress did not make room for anyone other than the SEC to exercise this flexibility." App., *infra*, 13a-14a.

Finally, the court suggested that its holding was not inconsistent with Congress' intent in passing PUHCA and the FPA. FERC was not powerless to affect SEC-approved prices; the Commission, like any private citizen, could "comment" on any proposed inter-affiliate transaction published in the Federal Register. App., *infra*, 14a. Moreover, the court observed, FERC could "conceivably ask the SEC to investigate whether the cost-based price for SOCCO coal violated" any PUHCA regulations. *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals recreates the "regulatory gap" that this Court intended to and did close in *Arcadia*. Like its interpretation of Section 318 of the FPA, the lower court's decision to clothe Section 13(b) of PUHCA with preemptive force will permit—indeed encourage—electric utilities to gouge their customers by manipulating the prices utilities pay for goods and services provided by their affiliates. What is worse, while the earlier decision disarmed the FERC from protecting consumers, the new ruling creates an even larger gap by precluding both federal *and state* regulators from disallowing costs in either wholesale or retail rates, no matter how much those costs exceed the market prices charged in comparable transactions by unaffiliated companies. As a result, the decision below will not only have a dramatic and immediate impact on the electric rates paid by petitioners' customers, but will affect nearly 50 million industrial, commercial and residential consumers across the country.

These untoward consequences, which justified certiorari to review the previous decision, are in no way compelled by Section 13(b) of PUHCA. Indeed, the lower court's interpretation of that provision is fundamentally inconsistent with, and in fact renders nugatory, this Court's interpretation of Section 318 of the FPA. Properly construed, Section 13(b) of PUHCA provides that SEC approval simply saves an affiliate transaction from condemnation as *per se* illegal; it does not immunize such transactions from all other regulatory scrutiny. The decision below adds an unenumerated area of SEC preeminence to those specifically identified in Section 318 of the FPA.

Nor does the alternative basis for the decision below—that FERC violated its own regulation—in any way detract from the need for this Court to review the court of appeals' interpretation of Section 13(b). By virtue of the court's interpretation of Section 13(b), FERC cannot

amend its regulation and thereby re-assert its authority to regulate SEC-approved fuel costs. Moreover, the lower court's unjustified refusal to defer to FERC's reasonable and consistent interpretation of its own regulation is itself an independent reason to review the decision below.

1. a. The Public Utility Act of 1935 had "two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate comerce." *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747, 758 (1973). As Justice Stevens explained, Title I of the Act, PUHCA, entrusted the first of these goals to the SEC, "the agency with the expertise in financial transactions and corporate finance. . . . The SEC carries out its duties essentially by monitoring inter-affiliate financial transactions and eliminating potential conflicts of interest." *Arcadia*, 111 S. Ct. at 423 (Stevens, J., concurring). Title II of the Act, the FPA, placed responsibility for the second of these broad statutory objectives on the FPC, now FERC. Unlike the SEC, FERC has the authority and possesses the technical expertise to regulate the transmission and sale of electric energy.

The decision below held that, under Section 13(b) of PUHCA, SEC jurisdiction over any inter-affiliate transaction involving the sale of goods or services completely insulates all aspects of that transaction from future ratemaking review by FERC, no matter what effect the transaction has on wholesale electric rates. Because any challenge to a FERC rate order can be brought in the D.C. Circuit see 16 U.S.C. § 825*l*(b), the court of appeals' decision will effectively eliminate FERC jurisdiction over the rate consequences of all such transactions. As a result, the decision below strips FERC of its ability to protect the nearly 50 million ratepayers across the country that receive electricity directly or indirectly from PUHCA-

regulated utilities[6] from potential self-dealing, unnecessary "gold plating" of plant and equipment, and rate manipulation arising from transactions between electric utilities and their affiliates.[7] The decision, moreover, creates a strong incentive for electric utilities to adopt the holding company form, and for new and existing holding companies to create new subsidiaries to provide every conceivable good and service needed for the generation, transmission and distribution of electricity—incentives that contravene PUHCA's explicitly stated goals of simplifying and, as soon as practicable, eliminating public utility holding companies. 15 U.S.C. § 79a(c).

The SEC lacks the expertise, authority and administrative apparatus to protect ratepayers against these harmful consequences. As the SEC itself has repeatedly acknowledged, it has "no power over the[] dealings [of electric utilities regulated under PUHCA] with their customers, retail or wholesale." *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978).[8] Nor, as a consequence, does it have any expertise in setting or assessing wholesale electric rates. Unlike FERC, moreover, the SEC has no statutory or administrative procedures by which a customer can initiate a complaint, cf. FPA § 206, 16 U.S.C. § 824e; and it has no clear authority to order

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[6] *See* Federal Energy Regulatory Commission, FERC Form 1, Annual Reports of Major Electric Utilities, Licensees and Others (1990); Electrical World, Directory of Electric Utilities (100th ed. 1992).

[7] The potential for rate manipulation is readily demonstrated by the suspiciously malleable "cost" of SOCCO's coal. The cost of that coal was nearly twice the market price before FERC initiated rate review proceedings, yet shortly thereafter fell to just 24 percent above market price. *See supra* pp. 4-5.

[8] *Accord In re Louisiana Power & Light Co.*, 26 S.E.C. Docket 1257, 1263 (1982); *In re New England Elec. Sys.*, 24 S.E.C. Docket 229, 235 (1981); *Arkansas Power & Light Co.*, 45 S.E.C. 567, 574 (1974).

refunds for overcharges if a utility is found to have violated the SEC's regulatory requirements. Cf. FPA § 205(e), 16 U.S.C. § 824d. The decision below, therefore, creates a serious gap in the regulation of electric utilities subject to PUHCA, one that Congress, in seeking to curb holding company abuses, could not have intended to create, and one that the SEC is wholly unprepared to fill.

The magnitude of this gap, and its impact on ratepayers, is illustrated by this very case. In the initial order approving the capitalization of SOCCO, the SEC staff conducted no hearings whatever and made no specific findings with respect to any aspect of the prices SOCCO might charge for coal it might sell to Ohio Power. *Ohio Power Co.* v. *FERC*, 880 F.2d at 1404. In its three subsequent orders, the staff simply "adverted briefly to the contractual relation between the associates." *Id.* In none of the four orders did the SEC staff cite Section 13(b) of PUHCA or describe any element of SOCCO's proposed costs other than the cost of capital, nor did it specifically approve any contract by which Ohio Power purchases coal from SOCCO. Certainly, no order of the SEC required Ohio Power to purchase its coal from a high-cost affiliate. Indeed, so cursory are these orders that the court below could only speculate, primarily on the basis of Congress' use of the phrase "at cost," as to whether the SEC staff had established cost as both a ceiling and a floor for SOCCO's coal prices. Yet, these orders, are now construed to strip the FERC of its authority to discharge one of its central statutory duties—determining the justness and reasonableness of wholesale electric rates.[9]

The effect this regulatory gap has on ratepayers is apparent. The prices Ohio Power paid its subsidiary for

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[9] Contrary to the lower court's suggestion, FERC plainly cannot protect ratepayers by commenting on proposed inter-affiliate transactions published in the Federal Register. In this very case, for instance, FERC could not have anticipated in 1971 the extent to which Ohio Power would continue to purchase coal from SOCCO when its costs greatly exceeded the market price.

coal exceeded market prices by 24 percent to 94 percent from 1981 to 1986. App., *infra*, 45a & n.87. Because coal costs represent approximately half the costs of generating electricity from Ohio Power's coal-fired generators (*supra* n.4), the rates paid by petitioners (and, therefore, their residents) between 1981 and 1986 were 12 to 47 percent higher than they would have been if the coal cost component of those rates had been constrained by the market. Thus, the decision below will not only require petitioners (and their residents) to repay to Ohio Power the approximately $5 million in overcharges that FERC ordered refunded to petitioners, but also is likely to lead to substantial increases in the future as well. Indeed, a great many of the nearly 50 million households and businesses that receive electricity directly or indirectly from utilities subject to PUHCA can reasonably expect similar increases as a result of the decision below, increases in both wholesale and retail rates [10] that they would not face if their electric utilities were not subject to PUHCA.

b. The decision below has spawned at least as wide a regulatory gap as the one this Court closed in *Arcadia* and has rendered the Court's prior ruling essentially a nullity. In *Arcadia*, this Court held that SEC approval of Ohio Power's dealings with SOCCO did not preempt FERC's ratemaking authority because the two agencies

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[10] Although the holding of the court of appeals applies directly to the ratemaking function of the FERC, its logic clearly preempts all state regulation as well. Thus, even though Ohio Power's coal costs may significantly increase the retail price of electricity in ways the state commissions would find impermissible, the state public utility commissions will be required to pass through those costs. The "regulatory gap" created by the court of appeals on remand, therefore, is in fact wider than the one it created with its first opinion. Moreover, the inability of the states to regulate these rates under the court's interpretation of Section 13(b) further undermines any argument that the lower court's alternative holding on the regulation minimizes the need for this Court to resolve the statutory issue. *See infra* pp. 24-25.

were regulating "*different* subject matter[s]." 111 S. Ct. at 422 (emphasis in original). The SEC, the Court concluded, was regulating "Ohio Power's *ac*quisition of coal," while FERC regulated Ohio Power's "*dis*position of electric power." *Id.* at 422 n.3 (first emphasis added).

The court of appeals, however, determined that FERC was effectively regulating "the economic relationship between Ohio Power and SOCCO" by refusing to allow Ohio Power to pass through the full price it paid SOCCO for coal. App., *infra*, 11a. In that court's view, Section 13(b) of PUHCA, without even mentioning FERC, commits that subject to the SEC's exclusive jurisdiction. The lower court's interpretation of Section 13(b), therefore, has given preemptive force to the very SEC orders that this Court concluded did not oust FERC of its ratemaking authority. Its interpretation, moreover, gives rise to the very dangers of regulatory disjunction that this Court's earlier decision should have eliminated.

Not only is the ruling below inconsistent in result with this Court's previous holding, it is fundamentally at odds with the reasoning underlying this Court's decision. In *Arcadia*, the Court rejected the notion that the phrase "or any other subject matter" in Section 318 ousted FERC of jurisdiction with respect to any matter over which the SEC possessed authority. Rather, the Court held, Section 318 preempts FERC's authority *only* where the two agencies both attempt to regulate a subject matter falling within one of four specifically enumerated "areas of plainly parallel authority granted both to the SEC, under PUHCA, and to the FPC (FERC), under the FPA." 111 S. Ct. at 419.

It necessarily follows from this holding that the SEC's authority is paramount *only* with respect to those conflicts expressly identified by Section 318, and that, to the extent other unidentified conflicts arise, FERC is not divested of its authority. The court below, however, held that a conflict that this Court concluded was outside the

scope of Section 318 nevertheless results in preemption of FERC authority. By giving such preemptive force to Section 13(b) of PUHCA—which is *not* among the PUHCA provisions this Court identified as the sources of the SEC's four areas of paramount authority, see *id.* at 419-20—the lower court has reinstated its interpretation of Section 318 in another guise. Its earlier ruling rendered Section 318's list of covered conflicts non-exclusive by adding a "catch all" phrase "or anything else"; its latest ruling effects the same result by finding preemption outside the conflicts of jurisdiction provision. The inconsistency with this Court's interpretation of Section 318 is the same in both cases and warrants review by this Court.

c. The inconsistency with this Court's prior holding is in no way compelled by the language of Section 13(b). In concluding that Section 13(b) preempted FERC of its authority to judge the propriety of costs included in wholesale rates, the court below relied on the fact that Section 13(b) directs the SEC to insure that inter-affiliate contracts are performed "economically and efficiently for the benefit of such associate companies *at cost*, fairly and equitably allocated among such companies." 15 U.S.C. § 79m(b) (emphasis added). The lower court, however, completely ignored the context in which the phrase "at cost" appears.

Section 13(b) begins by providing that

> it shall be *unlawful* for any subsidiary company of any registered holding company . . . to enter into . . . any service [or] sales . . . contract by which such company undertakes to perform services [for] . . . or sell goods to, any associate company thereof except in accordance with such terms and conditions . . . as the Commission by rules and regulations or order shall prescribe.

Id. (emphasis added). This introductory language makes clear that any SEC prescription that inter-affiliate sales

be made "at cost" simply saves such sales from automatic condemnation under Section 13(b) itself. The lower court, however, converted the statute's savings clause into a grant of statutory immunity. Under the lower court's interpretation, contracts that would be *per se* unlawful but for their compliance with an SEC-prescribed cost standard are shielded from all regulatory review, and presumably all other legal challenge as well.[11] The language of the statute not only fails to support, but positively militates against, such a result.

The lower court's myopic focus on the phrase "at cost" led it astray in yet another critical respect. The court concluded, based solely on the phrase "at cost," that Section 13(b) is more "specific" than Sections 205 and 206 of the FPA, and that this greater specificity gives the former preeminence over the latter. This Court, however, did not remand this case for the court of appeals to fashion a new conflicts rule; it remanded the case for a determination whether "the FERC-prescribed *rate* is not 'just and reasonable' because it 'traps' costs which the government itself has approved." *Arcadia*, 111 S. Ct. at 422 (emphasis added).

With respect to any inquiry into the equitable nature —*i.e.*, the "justness and reasonableness"—of FERC-prescribed rates, Sections 205 and 206 of the FPA are plainly more specific provisions than Section 13(b) of PUHCA. Section 13(b) does not even mention "rates" let alone a utility's electric wholesale rates; Sections 205 and 206, by contrast, speak directly to the "equities" of

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[11] It follows from the lower court's holding that, if SEC-approved costs cannot even be adjudged "unreasonable," they certainly cannot be found illegal. Thus, the reasoning of the decision below compels the conclusion, for example, that inter-affiliate prices are immune from scrutiny under the antitrust laws. Such a result simply underscores the error in the lower court's interpretation of Section 13(b), which is part of a statute designed, in part, to prevent anticompetitive practices. *Gulf States Utils. Co.* v. *FPC*, 411 U.S. 747, 758 (1973).

a utility's wholesale rates by directing FERC to approve only those rates that are "just and reasonable." [12] Thus, even assuming, as the lower court did, that the SEC and FERC requirements are irreconcilable, and that one must therefore take precedence over the other, the statutory provisions that most specifically address the question presented by this case are Sections 205 and 206 of the FPA.

In fact, however, because the agencies regulate different subjects—the SEC regulates the SOCCO-Ohio Power relationship (*i.e.*, "costs") and FERC regulates the Ohio Power-customer relationship (*i.e.*, "rates")—and because the requirements of each do not conflict (*i.e.*, there is no "trapping" of costs), the lower court's determination concerning which statutory provision is more "specific" was not only mistaken but unnecessary. This Court's decisions in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), make clear that cost "trapping" arises where one agency *requires* a utility to incur specific costs and a second agency sets a price that ignores the utility's obligations. See *Mississippi Power*, 487 U.S. at 374 ("it obviously cannot be unreasonable for [a utility] to procure the particular quantity of high-priced . . . power that FERC has *ordered it to pay for*") (emphasis added). Here, by contrast, nothing in the SEC's orders *requires* Ohio Power to purchase any SOCCO coal at all. Because

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[12] In fact, FERC considered Ohio Power's equitable claims in its order and disallowed refunds petitioners sought for 1980, 1981 and virtually all of 1982. The refunds FERC ordered applied only to rates Ohio Power collected after it was on notice that its rates were subject to review and potential refund under the comparable market test. App., *infra*, 52a. Moreover, FERC did not limit Ohio Power to collecting the lesser of SOCCO's "at cost" price or market price. Rather, FERC allowed the utility to recover the market price even if the actual cost of SOCCO's coal was lower. Thus, FERC simply provided Ohio Power's affiliate with an incentive to produce coal efficiently. Indeed, Ohio Power has claimed to have purchased SOCCO coal at below-market prices, a fact that demonstrates that the FERC-prescribed incentive is realistic and fair.

Ohio Power's coal costs were incurred voluntarily, there can be no "trapping" of those costs. See *id.* at 373-74 ("it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power"). In any event, the court of appeals refused to undertake any such inquiry and instead rendered a decision entirely unresponsive to the specific remand order. This departure from the Court's mandate provides an additional reason to review the decision below.

2. The lower court also ruled that, by promulgating Section 35.14(a)(7), FERC unilaterally disabled itself from exercising jurisdiction over all fuel costs subject to the SEC's approval. The court's refusal to defer to FERC's entirely reasonable and in fact absolutely correct reading of its own regulation, and the court's substitution of its own crabbed interpretation, provide independent issues for review by this Court. Moreover, this "alternative" ground for the decision below in no way minimizes the economic or legal significance of the lower court's statutory ruling and plainly should not insulate that ruling from review.

a. Section 35.14(a)(7) of FERC's regulations provides, in part, that "[w]here [a] utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the [utility's fuel] adjustment clause." 18 C.F.R. § 35.14(a)(7) (1992). The court of appeals' determination that this sentence has but one meaning, and can *only* be understood as giving rise to a conclusive presumption of justness and reasonableness, is demonstrably incorrect.

Even when read in isolation, the sentence upon which the court of appeals chose to focus is ambiguous at best. Had the agency wished to create a conclusive presumption, it could have done so expressly, simply by using the phrase "shall be presumed conclusively" instead of the vague phrase "shall be deemed." Moreover, had FERC intended to abandon all review of fuel costs subject to the jurisdiction of another agency, it should have provided

that such costs shall be presumed conclusively to be "just and reasonable"—the terms Sections 205 and 206 of the FPA use to describe legal rates—and not merely "deemed to be reasonable and *includable*" in "adjustment clause[s]."

In holding that the regulation was unambiguous, the court below relied on a handful of decisions involving entirely different statutes in which "courts construing the word 'deemed' have *generally* found that it establishes a conclusive presumption." App., *infra*, 8a (emphasis added). But as the court's own qualifying language implicitly acknowledges, courts have also construed "deem" to create only a rebuttable presumption [13]—a fact that simply underscores the ambiguous nature of the word itself and the importance of the context in which it is used.[14]

Here, the context makes abundantly clear that the regulation does not give rise to a conclusive presumption. *First*, such a presumption is entirely inconsistent with the full text of the regulation, which demonstrates that Section 35.14(a)(7)'s purpose is simply to establish which costs a public utility may automatically include in the fuel adjustment clause without obtaining *prior* FERC approval. Thus, the final sentence of the regulation, which the court of appeals ignored, provides that "[f]uel charges by affiliated companies which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to

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[13] *See, e.g., Lavine* v. *Milne*, 424 U.S. 577, 583 (1976); *Brimm* v. *Cache Valley Banking Co.*, 269 P.2d 859, 863-64 (Utah 1985) (citing examples); *Hardy* v. *Lomenzo*, 349 F. Supp. 617, 621 (S.D.N.Y. 1972); *D&B Coal Co.* v. *Farmer*, 613 S.W.2d 853, 854 (Ky. 1981); *Miller* v. *Commonwealth*, 2 S.E.2d 343, 348-49 (Va. 1939).

[14] In *Dameron* v. *Brodhead*, 345 U.S. 322, 326-27 (1953), a case Judge Mikva cited in his earlier concurrence but the panel below did not, this Court declined to interpret the word "deemed" as creating a rebuttable presumption not because the word had a single, unambiguous meaning, but because such an interpretation would nullify the statute at issue.

be made by the Commission on its own motion under section 206 of the Federal Power Act." 18 C.F.R. § 35.14(a)(7) (1992). Consistent with this sentence, just eight months after the regulation was promulgated the Commission authorized an investigation into fuel costs paid by another AEP-held utility to an affiliate despite the utility's contention that SEC approval of its costs rendered such an investigation improper. *McDowell County Consumers Council, Inc.* v. *American Elec. Power Co.*, 54 F.P.C. 361 (1975).

Second, a conclusive presumption is squarely at odds with FERC's mandate, under Section 205(f) of the FPA, to order a public utility to "cease any practice in connection with the [fuel adjustment] clause, if [such] clause . . . does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause." 16 U.S.C. § 824d(f). Plainly, FERC cannot maintain a regulation that disavows its statutory obligation to conduct periodic reviews of automatic fuel adjustment clauses. That it did not do so in Section 35.14(a)(7) is apparent when the regulation, particularly its last sentence, is read in its entirety.

Third, the conclusive presumption adopted by the court of appeals cannot be reconciled with two regulatory principles to which FERC has consistently adhered: 1) expenses passed through fuel adjustment clauses are reviewable, both retroactively and prospectively, in rate proceedings under Sections 205 and 206 of the FPA [15];

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[15] *See Illinois Power Co.*, 52 FERC ¶ 61,162 (1990) (FERC has authority to require refunds of costs previously collected under a fuel cost adjustment clause); *Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,199 (1983) (same); *Carolina Power & Light Co.*, 17 F.E.R.C. ¶ 61,118 (1981) (same); *Electric Coops. of Kansas*, 14 F.E.R.C. ¶ 61,176 (1981) (same); *Public Serv. Co. of New Hampshire*, 6 F.E.R.C. ¶ 61,299 (1979) (same).

and 2) a utility's costs are not presumed to be prudently incurred when they are paid to an affiliate.[16]

Under these circumstances, the lower court's failure to grant "substantial deference" to FERC's "reasonable, consistently held interpretation" of its own regulation was plainly erroneous. See *Arkansas* v. *Oklahoma*, 112 S. Ct. 1046, 1059 (1992). The error in this case is particularly egregious, however, and particularly deserving of review. In holding that "section 35.14(a)(7) establishes, *as a policy matter*, that if another regulatory body has already passed on the fuel price, then FERC will abide by that determination," App., *infra*, 9a (emphasis added), the lower court transparently substituted its *own* policy judgment—one it has doggedly sought to impose on FERC through its interpretation first of Section 318 of the FPA and now of Section 13(b) of PUHCA—for the policy judgment the responsible agency chose to make. Tellingly, the court below offered no explanation for why an agency whose "principal goal[] is to ensure that the rates customers pay for their electricity are 'just and reasonable,'" *Arcadia*, 111 S. Ct. at 423 (Stevens, J., concurring), would unilaterally divest itself of all jurisdiction to review what may often be, and in this case was, the single largest component of wholesale rates.[17] In fact, such a disavowal of jurisdiction gives

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[16] *See Nantahala Power & Light Co.* v. *FERC*, 727 F.2d 1342, 1345 (4th Cir. 1984); *Portland Gen. Exch., Inc.*, 51 F.E.R.C. ¶ 61,108, at 61,243-246 (1990); *Sea Robin Pipeline Co.*, 49 F.E.R.C. ¶ 61,351 (1989). This principle completely belies Ohio Power's argument, accepted by Judge Mikva in his initial concurrence, *see Ohio Power Co.* v. *FERC*, 880 F.2d at 1413, that reading Section 35.14(a)(7) to create only a rebuttable presumption would render the regulation superfluous because FERC already presumes that utility costs are prudently incurred.

[17] Judge Mikva initially suggested that FERC would so disable itself because "the purpose of section 35.14(a)(7) . . . is to avoid unreasonable fuel costs between affiliated companies" and thus, if the SEC "has already made that determination, . . . there is no reason for FERC to second-guess [it]." *Ohio Power Co.* v. *FERC*,

rise to the same regulatory gap and its attendant evils that led FERC to conclude that Section 318 of the FPA does not divest it of jurisdiction over such costs. Accordingly, because the lower court, in interpreting FERC's regulation, simply forced a policy judgment on FERC that the agency has not chosen to make, and because the lower court's interpretation of Section 35.14(a)(7) opens the same regulatory gap this Court previously closed, this Court should review the "alternative" basis for the decision below.

b. In any event, the regulatory ruling does not obviate the need to review the lower court's interpretation of Section 13(b) of PUHCA. As the lower court itself recognized, while its interpretation of FERC's regulation provided Ohio Power with "some succor" from the overlapping jurisdiction of the SEC and FERC, "[i]f FERC wishes to have § 35.14(a)(7) create only a rebuttable presumption, . . . it may do so explicitly." App., *infra*, 9a. To provide Ohio Power and all other registered public utility holding companies complete relief from the "problem" of such regulatory overlap, therefore, the lower court found it necessary to decide that Section 13(b) of PUHCA preempted FERC's ratemaking authority.

Not only was the statutory ruling necessary to the holding below, it completely precludes FERC from reasserting jurisdiction over SEC-approved fuel costs through repromulgation of its regulation, and likewise bars state regulators from asserting jurisdiction over such

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880 F.2d at 1414. Consistent with FERC's statutory mandate, however, the purpose of its fuel adjustment clause regulation is not to regulate costs between affiliated companies, but to regulate the rates utilities charge their customers. The SEC, of course, does not make rate determinations. *See supra* p. 13 & n.8. In light of the agencies' different statutory goals and fields of expertise, therefore, FERC would have no reason to presume conclusively that SEC-approved costs will *always* yield just and reasonable rates. Certainly, FERC could not rationally presume that costs that are merely subject to SEC review will always be reasonable.

costs. FERC is thus powerless to close the regulatory gap or remedy the economic dislocation that the lower court's interpretation of Section 13(b) has caused. The lower court's statutory ruling, moreover, will likely escape review altogether if it is not addressed by the Court in this case. FERC now has no reason to alter its regulation,[18] and therefore, in the future, it can be expected to approve pass-throughs of SEC-approved fuel costs on the basis of its unrevised (and unrevisable) regulation. Thus, there will be no further occasion for courts to consider whether Section 13(b) of PUHCA ousts FERC of all ratemaking authority over SEC-approved fuel costs. As a consequence, the regulatory gap created by the statutory ruling will go unremedied, and this Court's ruling in *Arcadia* will be completely frustrated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 10, 1992

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[18] As FERC explained in its petition for rehearing before the court of appeals, "repromulgation [of Section 35.14(a)(7)] would be unavailing unless this Court overturns the panel's statutory ruling." Petition for Rehearing and Suggestion for Rehearing *En Banc* at 13 n.7. This is particularly true inasmuch as all FERC orders are reviewable in the District of Columbia Circuit. *See* 16 U.S.C. § 825*l*(b). Under these circumstances, FERC cannot be expected to undertake the entirely futile gesture of repromulgating an unenforceable regulation.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

LCP CHEMICALS & PLASTICS, INC., *et al.*,
MUNICIPAL WHOLESALE ELECTRIC CUSTOMERS OF
OHIO POWER COMPANY,
Intervenors.

On Remand from the United States Supreme Court

Argued Sept. 27, 1991

Decided Feb. 4, 1992

Edward Berlin, with whom Kenneth G. Jaffe and Edward J. Brady, Washington, D.C., were on the brief, for petitioner. Andrew L. Lipps, Washington, D.C., also entered an appearance for petitioner.

Joseph S. Davies, Deputy Sol., with whom William S. Scherman, Gen. Counsel, Jerome M. Feit, Sol., and Timm

Abendroth, Atty., Washington, D.C., were on the brief, for respondent. John Estes, Joanne Leveque, and Catherine C. Cook, Attys., F.E.R.C., Washington, D.C., also entered appearances for respondent.

Gregg D. Ottinger, with whom John P. Williams, Washington, D.C., and Lee F. Feinberg, Charleston, W.V., were on the brief, for intervenors.

James B. Liberman, Washington, D.C., was on the brief for amici curiae Registered Holding Co. Group, urging that the decision of the F.E.R.C. be reversed and the matter remanded to the Com'n.

James R. Doty, Ge .. Counsel, Jacob H. Stillman, Associate Gen. Counsel, Katherine Gresham, Asst. Gen. Counsel, and Paul Gonson, Sol., S.E.C., Washington, D.C., were on the brief for amicus curiae.

Before MIKVA, Chief Judge, and SILBERMAN and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge:

Ohio Power Company, a producer of electricity, was subjected to the regulatory jurisdiction of two agencies, the Federal Energy Regulation Commission ("FERC") and the Securities and Exchange Commission ("SEC"). Specifically, FERC determined in a wholesale rate proceeding that the SEC-approved price paid by Ohio Power for coal from its associate Southern Ohio Coal Company ("SOCCO") could not be included in Ohio Power's wholesale rate to the extent that it was greater than the market price for comparable coal. *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098 (1987).

We initially granted Ohio Power's petition to vacate the FERC order on the ground that § 318 of the Federal Power Act insulated SEC-approved prices from FERC alteration.

Ohio Power Co. v. FERC, 880 F.2d 1400, 1410 (D.C.Cir. 1989). Ruling that § 318 did not address the conflict faced by Ohio Power, the Supreme Court remanded the case to us. *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 422, 112 L.Ed.2d 374 (1990). We now grant Ohio Power's petition to vacate the FERC order for the reasons discussed below.

BACKGROUND

I. *The Statutory Scheme*

In 1935, Congress enacted grants of authority to the SEC and FERC's predecessor, the Federal Power Commission, under an umbrella statute entitled the Public Utility Act, ch. 687, 49 Stat. 803 (1935). Title I, known as the Public Utility Holding Company Act ("PUHCA"), empowers the SEC to curb abuses affecting investors and consumers created by transactions between subsidiary associates of public utility holding companies. 49 Stat. 803 (1935) (codified as amended at 15 U.S.C. §§ 79a to 79z-6). The SEC discharges its responsibilities in large part under § 13 of the PUHCA, which makes transactions between associate companies unlawful unless they are approved by the SEC at terms found to be "in the public interest or for the protection of investors or consumers." 15 U.S.C. § 79m(b).[1]

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[1] Section 13(b) of PUHCA states in pertinent part that

> it shall be unlawful for any subsidiary company of any registered holding company . . . to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods, to any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the bene-

Title II, known as the Federal Power Act ("FPA"), established the Federal Power Commission to oversee the wholesale transmission and sale of interstate electric power. 49 Stat. 838 (1935) (codified as amended at 16 U.S.C. §§ 791a-825r). FERC, which succeeded the now-departed Federal Power Commission, fulfills a critical part of its mandate by setting "just and reasonable" wholesale electric rates under §§ 205 and 206 of the FPA. 16 U.S.C. §§ 824d & 824e. Thus, under the FPA and the PUHCA,

> FERC-regulated electric power companies [such as Ohio Power] that are subsidiaries or affiliates of registered public utility holding companies are therefor subject to SEC regulation as well.

Arcadia, 111 S.Ct. at 417; *see also Ohio Power Co.*, 880 F.2d at 1402-04 (summarizing statutory backdrop of this action).

II. *Factual Background*

Ohio Power Company produces electricity with coal-burning generation plants and is a subsidiary of one of the nation's largest public utility holding companies, American Electric Power Company. In 1971, Ohio Power entered into a lease with the owners of the Martinka Mine for development of coal by Ohio Power's subsidiary and associate, SOCCO. Before Ohio Power could capitalize SOCCO's mining operations by purchasing its stock, § 10 of PUHCA required the SEC to approve the proposed transaction. 15 U.S.C. § 79j. In its order of December 2, 1971, the SEC determined that Ohio Power could obtain coal from SOCCO at a price "based on an amount equal to the actual cost" of coal production including a reasonable rate of return on Ohio Power's capital invest-

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> fit of such associate companies at cost, fairly and equitably allocated among such companies.

15 U.S.C. § 79m(b).

ment. *Ohio Power Co.*, Holding Company Act Release ("HCAR") No. 17,383 (1971); *see Arcadia*, 111 S.Ct. at 417-18 (discussing history of Ohio Power's capitalization of SOCCO).[2]

This action came initially before us as a result of a May 28, 1982, wholesale rate increase application that Ohio Power filed with FERC pursuant to §§ 205 and 206 of the FPA. FERC eventually accepted the application except for Ohio Power's request to pass through the cost-based price that it paid for SOCCO coal. Asserting that comparable coal could be obtained at a cheaper market price, FERC found the SOCCO coal price unreasonable and therefore not includable in Ohio Power's wholesale rate. *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098, at 61,275 (1987). Ohio Power insisted the SEC alone had jurisdiction over the price that associates may charge each other for goods,[3] and sought judicial vindication.

Before this Court, Ohio Power and FERC argued that the controversy centered on the application of the jurisdictional conflicts provision of the Public Utility Act, § 318 of the FPA. *Ohio Power Co.*, 880 F.2d at 1405-09. The parties agreed § 318 provided that the requirements of the PUHCA govern when a company is subject to conflicting PUHCA and FPA regulation "with respect to the same subject matter." 16 U.S.C. § 825q. FERC defended its order on two grounds: first, by claiming there was no conflict between the agencies because the FERC order required Ohio Power to pay a market price that was less than cost and the SEC orders simply required Ohio

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[2] As observed by the Supreme Court, Ohio Power obtained three additional SEC approvals for various capital transactions with SOCCO. *See Ohio Power Co.*, HCAR No. 20,515, 14 SEC Docket 928 (1978); *Southern Ohio Coal Co.*, HCAR No. 21,008, 17 SEC Docket 310 (1979); and *Southern Ohio Coal Co.*, HCAR No. 21,537, 19 SEC Docket 1309 (1980).

[3] SEC regulation 17 C.F.R. § 250.80(b) defines "goods" to include coal.

Power to pay no more than cost; and second, by asserting that, regardless of conflict, since FERC was regulating wholesale rates and the SEC was regulating inter-associates prices, the agencies were not regulating the "same subject matter." *Ohio Power Co.*, 880 F.2d at 1405.

This Court agreed with Ohio Power that even if the SEC orders were read to enshrine cost only as a ceiling, Ohio Power was nevertheless subject to conflicting regulatory authorities in that FERC had "set by order a different price term" for a contract approved by the SEC. *Id.* at 1406. Similarly, we found that the two agencies were regulating the "same subject matter," and that therefore § 318 required FERC to defer to the SEC's approval of a cost-based price for SOCCO coal. *Id.* at 1408-09. In a separate opinion, Judge, now Chief Judge, Mikva concurred in the result, but on the alternative ground that FERC had violated one of its own regulations requiring it to "deem" reasonable and includable prices set by other regulatory bodies (here, the SEC). *Id.* at 1412-14 (construing FERC regulation 18 C.F.R. § 35.-14(a)(7)).

In its review, the Supreme Court adopted a reading of § 318 not advanced by "the parties, the interested agencies, [or] the Court of Appeals," *Arcadia*, 111 S.Ct. at 422 (Stevens, J., concurring), and found that the conflict affecting Ohio Power was not covered by § 318. *Id.* at 421-22. The *Arcadia* Court read § 318 as applying only to four specifically enumerated types of conflicts, and held that, although Ohio Power was subject to "overlapping regulatory jurisdiction of both the SEC and of FERC," *id.* at 417, § 318 was silent regarding the type of overlap asserted by Ohio Power in this case. *Id.* at 422.

Advising us that its interpretation of § 318 did not "end review of the FERC order," the Court remanded with instructions to resolve whether: (1) as Judge Mikva observed, FERC violated its own regulation; and (2) "the

FERC-prescribed rate" is unjust and unreasonable because it " 'traps' costs which the government [the SEC] itself has approved". *Id.*

Justice Stevens wrote a concurring opinion, joined by Justice Marshall, in which he found that even if the overlap in authorities fell within the enumerated subjects of § 318, there was "no risk of conflict between the requirements of the SEC and FERC in this case." *Id.* at 423 (Stevens, J., concurring). Justices Stevens and Marshall, therefore, agreed with FERC that the two agencies were regulating different subject matters, with FERC overseeing "what portion of its fuel costs Ohio Power may pass along to its customers" and the SEC placing a ceiling on "the price which Ohio Power pays its [coal] supplier—SOCCO." *Id.* The concurrence ended by commenting that Congress's intent would be frustrated by a holding that would allow the SEC to hamper FERC's regulation of wholesale rates. *Id.* at 423-24.

ANALYSIS

I. *FERC Regulation 18 C.F.R. § 35.14(a)(7)*

As instructed by the Court, we have reviewed Part II of Judge Mikva's concurring opinion, which contended that a remand was required on the ground that 18 C.F.R. § 35.14(a)(7) of FERC's own rules precluded FERC from "imposing its market-price test" in the face of a cost-based coal price approved by the SEC. *Ohio Power Co.*, 880 F.2d at 1412-14. Judge Mikva concluded that "[u]nder the regulation, because the prices of Ohio Power's fuel from its affiliate are subject to the jurisdiction of the SEC, such costs must be conclusively presumed reasonable." *Id.* at 1414. We now adopt Judge Mikva's approach as reflecting the view of this panel.

Section 35.14(a)(7) addresses fuel price adjustment clauses in filed rate schedules, and provides in pertinent part:

> Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause.

18 C.F.R. § 35.14(a)(7). The dispute here focuses on the meaning of the word "deemed," with Ohio Power arguing that it establishes a conclusive presumption for including such costs, and FERC urging that it sets only a rebuttable presumption, which in Ohio Power's case was disproved.

Judge Mikva began by remarking that "no deference is owed an interpretation at odds with the plain meaning of the text." *Ohio Power Co.*, 880 F.2d at 1413 (Mikva, J., concurring) (citing *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C.Cir.1983) ("When an agency's interpretation flies in the face of the language of the rules themselves, it is owed no deference.")). He then found that "courts construing the word 'deemed' have generally found that it establishes a conclusive presumption." *Id.* (citing, e.g., *H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer.Ct.App.1954) (finding near "unanimous judicial determination that the word [deemed], when employed in statutory law, creates a conclusive presumption.")). In addition to *H.P. Coffee* and the other cases cited in the concurrence, we note also that two decisions from this Circuit have construed the term deemed and found that it created a conclusive presumption. *See Gaither v. Myers*, 404 F.2d 216, 218 (D.C.Cir. 1968) (finding that use of term deemed in a liability statute changed the common law rule of agency by making agency status turn solely on the consent of an owner to use a car, while the common law rule considered consent one of many factors); and *Forrester v. Jerman*, 90 F.2d 412, 413 (D.C.Cir.1937) (interpreting same statute as in *Gaither* and reaching same conclusion after finding that deemed "is unambiguous and leaves nothing for interpretation"). Given the unambiguous character of deemed,

then, we find case law amply supports our finding that the plain language of § 35.14(a)(7) requires FERC to include in Ohio Power's wholesale rate the SEC-approved cost-based price for SOCCO coal.

FERC attempts to cloud the clear meaning of deemed by pointing to the complicated rulemaking history of § 35.14(a)(7). Brief of Respondent at 31-32. We agree with Judge Mikva's past disposition of this argument and find that, if anything, the regulatory history cuts against a rebuttable presumption interpretation of deemed, particularly when considering the evolution of the regulation from its proposed form in 1973 to its final promulgation in 1974. *See Ohio Power Co.*, 880 F.2d at 1413-14. The original version stated that "[o]nly the reasonable cost of fuel [purchased from an associate] may be included" in the wholesale rate, 38 Fed.Reg. 17,253 (1973), language consistent with the rebuttable presumption urged by FERC. But the regulation as ultimately issued abandoned this formulation and instead contained the "such cost shall be deemed reasonable and includable" language that we read as creating a conclusive presumption. 39 Fed.Reg. 28,911 (1974).

Finally, we find prior administrative pronouncements regarding the meaning of § 35.14(a)(7) of little moment to the extent they are not consistent with the unambiguous terms of the regulation. *See Union of Concerned Scientists*, 711 F.2d at 381. If FERC wishes to have § 35.14(a)(7) create only a rebuttable presumption, then it may do so explicitly through the required process. As currently written, however, we agree with Judge Mikva that "section 35.14(a)(7) establishes, as a policy matter, that if another regulatory body has already passed on the fuel price, then FERC will abide by that determination." *Ohio Power Co.*, 880 F.2d at 1414. We therefore hold that under § 35.14(a)(7), FERC was obliged to find "reasonable and includabe" Ohio Power's fuel costs as approved by the SEC, and we remand to FERC for further findings not inconsistent with this opinion.

II. *Reconcilation of the Overlapping Regulatory Authorities*

By precluding FERC from declaring an SEC-approved price unreasonable, our interpretation of § 35.14(a)(7) provides Ohio Power with some succor from the "overlapping regulatory jurisdiction of both the SEC and of FERC" found by the *Arcadia* Court. 111 S.Ct. at 417. However, we believe that more than the regulation requires this result.

In *Arcadia*, the Supreme Court advised us that § 318 is not the mechanism by which the overlapping regulatory jurisdiction issue may be resolved. The Court left for us, though, the task of deciding how to reconcile the conflict, if any, created by FERC's attempt to allow only a market-based price for SOCCO coal when calculating wholesale rates and the SEC's orders requiring Ohio Power to pay either cost or no more than cost for SOCCO coal.

To begin, we do find that the overlapping authorities have resulted in unavoidable conflicting requirements for Ohio Power. Justice Stevens in his *Arcadia* concurrence noted that the "market price for coal during the time relevant to this proceeding has been less than SOCCO's costs." *Arcadia*, 111 S.Ct. at 423. From this, he reasoned that no conflict existed since the SEC orders did no more than "establish a ceiling requiring that the price SOCCO charges its affiliates for coal remain at or below its costs." *Id.*

However, Ohio Power represents that the "market price, calculated according to FERC's methodology, has exceeded the cost of mining Martinka coal in some months." Brief of Petitioner Ohio Power at 24 & n. 15. FERC does not contest this representation. Moreover, if one interprets the SEC orders as establishing cost as both a floor and a ceiling, then Ohio Power will suffer regulatory dissonance whenever the market price deviates from cost.

We are also unpersuaded by the argument that no conflict exists because FERC is simply regulating how much Ohio Power can charge for power, not how much Ohio Power pays for SOCCO coal. By declaring a portion of the SOCCO coal price unreasonable and therefore not includable in Ohio Power's wholesale rate, FERC is undeniably affecting the economic relationship between Ohio Power and SOCCO, a relationship approved by, and under the jurisdiction of, the SEC. *Cf. Nantahala Power & Light v. Thornburg*, 476 U.S. 953, 971, 106 S.Ct. 2349, 2359, 90 L.Ed.2d 943 (1986) (overturning action of a state regulatory body that, by its orders establishing retail rates, required the regulated entity to "pretend that it is paying less for the power it receives . . . , under agreements not subject to [the state's] jurisdiction, than is in fact the case.").

We find the resolution of this conflict in the plain language of the statute authorizing the SEC to regulate sales contracts of associate companies. Section 13(b) of the PUHCA empowers the SEC to approve the price of inter-associate sales of goods, such as coal, and directs the SEC to price these goods "at cost, fairly and equitably allocated among [associate] companies." 15 U.S.C. § 79m(b). Here, the SEC did just that with its four orders approving Ohio Power's relationship with SOCCO, which reflected § 13(b)'s mandate to price SOCCO's coal "at cost." [4]

In contrast to the SEC's specific statutory mandate to establish a cost-based price for sales of goods between associates, FERC can point to no equivalent authority besides its general charge to establish "just and reasonable" wholesale electric rates. 16 U.S.C. §§ 824d & 824e. Of course, it is black letter law that when a conflict arises between specific and general provisions of the same legislation, the courts should give voice to Congress's specific articulation of its policies and preferences. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05,

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[4] *See supra* note 1 and accompanying text.

at 105 n. 19 (5th ed. 1992). Accordingly, we hold that Congress in § 13(b) of the PUHCA authorized the SEC to set the price of SOCCO coal "at cost," and in so doing constrained FERC from altering that price under its "just and reasonable" rate-setting authority.

In support of its order, FERC advances the argument that the SEC orders "do not appear to mandate the cost-based price where a market price could be lower, rather they permit a price up to a cost-based price." *Ohio Power Co.*, 39 F.E.R.C. ¶ 61,098, at 61,276 (1987), *quoted in* Brief of Respondent at 26. Citing SEC Rule 92, 17 C.F.R. § 250.92, the Commission found that "not only does the SEC not require a cost-based price for the subsidiary coal, *the SEC may require* a market-based price for subsidiary coal if the market price is lower than cost." *Id.* (emphasis added).

Without addressing whether the SEC does in fact have the authority to establish a lower-than-cost market price,[5] even FERC concedes that Rule 92 empowers the SEC alone to set such a price. FERC does not cite, and we can not find, any indication in the orders that the SEC was exercising its authority to establish a below-cost market price for SOCCO coal. The orders do not mention market price as a limit to price, nor do they require Ohio Power to show that comparable coal was unavailable before paying cost for SOCCO coal.[6]

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[5] The SEC does have express statutory authority under § 13(b) to deviate from the "at cost" standard when a transaction "involve[s] special or unusual circumstances." 15 U.S.C. § 79m(b). However, no one has suggested that the SEC invoked this source of authority in the orders concerning Ohio Power.

[6] According to its brief, the SEC "has long recognized" that a lower-of-cost-or-market interpretation would effectively eliminate affiliate transactions by preventing investors from keeping profits when cost is below market (to offset losses when cost is above market). Brief of Amicus SEC at 4. *See also Ohio Power Co.*, 880 F.2d at 1410 (observing that FERC interpretation of SEC orders places Ohio Power in a "tails-we-lose" situation).

Instead, the orders appear to embrace the cost-based price principles required by SEC Rules 90 and 91. 17 C.F.R. §§ 250.90 & 250.91. Consistent with § 13(b) of PUHCA, SEC Rule 90(a) prohibits associates from selling goods to each other at "more than cost," 17 C.F.R. § 250.90(a), and Rule 91(a) defines "more than cost" as "not exceed[ing] a fair and equitable allocation of expenses." 17 C.F.R. § 250.91(a).[7] The SEC orders harmoniously track this language. For example, the 1971 order states that the "charges for coal by [SOCCO] will be based on an amount equal to the actual cost," *Ohio Power Co.*, HCAR No. 17,383 (1971), and the 1978 order states that the "price at which [SOCCO] coal is sold to [Ohio Power] will not exceed the cost thereof to the seller." *Ohio Power Co.*, HCAR No. 20,515, 14 S.E.C. Docket 928 (1978); *see also Southern Ohio Coal Co.*, HCAR No. 21,537, 19 S.E.C. Docket 1309 (1980) (stating that the price of SOCCO coal "will not exceed the cost thereof to the seller.").

That the 1978 and the 1980 orders, as well as SEC Rules 90 and 91, place more emphasis on cost as a ceiling rather than a floor is not surprising given the economic incentive of associate companies to pass through inflated costs for goods and services. *See* 15 U.S.C. § 79a(b)(2) (describing the following as one of the evils that make SEC regulation of associates necessary: "subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials"). But this concern with excessive charges does not diminish the exclusive role cost plays in establishing associate prices—Congress's use of the term "at cost" indicates that cost serves as a ceiling and a floor. To the extent there is downward flexibility in a cost-based

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[7] SEC Rule 90(d) does provide that the price of goods "need not be limited to cost," and then references the market-price cap discussed in Rule 92; but, as stated above, this provision was not relied upon by the SEC in this case.

price, we find that Congress did not make room for anyone other than the SEC to exercise this flexibility. We therefore find that the orders are better read as requiring Ohio Power to pay a price "equal to cost" for SOCCO coal, as prescribed by § 13(b) and the 1971 SEC order, and we reject FERC's attempt to clothe itself with the SEC's purported authority under Rule 92 to establish a market-based cap.[8]

In response to the congressional intent concerns expressed in Justice Stevens's concurrence, we do not mean to say that FERC is powerless to affect the SEC's price-approval process. When the SEC receives for approval an associate transaction and the suggested prices at which goods will be sold, SEC Rule 28 requires notice in the Federal Register and an opportunity for comment on the proposal. 17 C.F.R. § 250.23. Such notice was provided as part of Ohio Power's applications to the SEC. Additionally, FERC could conceivably ask the SEC to investigate whether the cost-based price for SOCCO coal violated "any rule or regulation" of the PUHCA. *See* 15 U.S.C. § 79r(a). Thus, FERC may attempt to affect the price-approval process, but Congress has granted the SEC alone the authority to establish prices charged by associates for goods.

Therefore, regardless of whether FERC may under other circumstances set prices that trap costs created by orders of other governmental entities, we hold that FERC may not set a cost-trapping rate level where that effect is occasioned by a recovery calculation inconsistent with an SEC determination governing an inter-associate transfer subject to § 13(b) of the PUHCA.

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[8] Although we grant the SEC's views no deference, we note that our interpretation of the SEC's orders is consistent with their submission in this case. *See* Brief of Amicus SEC at 5.

CONCLUSION

In conclusion, we hold that 18 C.F.R. § 35.14(a)(7) prevents FERC from finding the coal price approved by the SEC not includable in determining Ohio Power's wholesale rate. As a separate ground for remand, we hold that the SEC properly discharged its authority under § 13(b) of the PUHCA by setting the price of coal sold by SOCCO to its associate Ohio Power "at cost," and that FERC must respect this specific grant of authority to the SEC. For the reasons given above, therefore, we allow the petition for review, and vacate and remand the order of FERC for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

Before: Mikva, Chief Judge; Silberman and Sentelle, Circuit Judges

ORDER

[Filed Apr. 14, 1992]

Upon consideration of the Petitions for Rehearing of respondent and intervenor it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Filed Apr. 14, 1992]

The Suggestions For Rehearing *En Banc* of respondent and intervenor have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. ER82-553-000 and ER82-554-000

OHIO POWER COMPANY

Opinion No. 272; Opinion and Order on Recovery of the Cost of Coal Purchased From an Affiliate

(Issued April 30, 1987)

Before Commissioners: Martha O. Hesse, Chairman: Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the presiding administrative law judge, issued December 14, 1983, appears at 25 FERC ¶ 63,060.]

Appearances

Edward J. Brady, Marvin I. Resnick, Alan Kessler, and *William E. Olson* for Ohio Power Company

William H. Roberts and *Richard Hitt* for Public Service Commission of West Virginia

Paul Nordstrom, Glen L. Ortman, Kenneth E. Natale, Donald R. Allen, David P. Yaffe, and *Gregg D. Ottinger* for the Municipal Wholesale Electric Customers of Ohio Power Company

Phillip Nelson and *O.C. Hall* for Wheeling Electric Company

James D. Kauffelt for Linden Chemicals and Plastic, Inc., Mobay Chemical Corporation, and PPG Industrials, Inc.

Melvin Berger, Arthur Hays Butler, Lawrence R. Greenfield, Michael Small, James E. Rogers, Jr., Marilyn L. Doria, Harvey L. Reiter and *Daniel Watkiss* for the staff of the Federal Energy Regulatory Commission

[Opinion No. 272 Text]

I. Introduction and Summary

On May 28, 1982, the Ohio Power Company (Ohio Power) filed rate increases for its wholesale service to fifteen municipalities in the State of Ohio (Docket No. ER82-553-000) and to its affiliate in West Virginia, the Wheeling Electric Company (Docket No. ER82-554-000). The Commission accepted settlements dealing with all aspects of the proposed rates except what was called the captive coal issue which involves a challenge to the reasonableness of the fuel costs recovered from Ohio Power's wholesale customers for the coal it purchased from the Martinka mine.[1]

The Martinka mine is owned and operated by the Southern Ohio Coal Company, a wholly owned subsidiary of Ohio Power. Ohio Power is owned by the American Electric Power Company (AEP). AEP owns seven other electric utilities that operate as a coordinated system in a seven-state area. AEP is subject to regulation by the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act of 1935 (PUHCA).[2]

An initial decision on the reasonableness of Ohio Power's coal costs was issued on December 14, 1983.[3] In the initial decision the presiding judge found that:

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[1] *See Ohio Power Company*, 23 FERC ¶ 61,236 (1983) and 24 FERC ¶ 61,017 (1983).

[2] 15 U.S.C. § 79a (1982).

[3] 25 FERC ¶ 63,060 (1983).

(1) section 318 of the Federal Power Act does not preclude the Commission from determining whether it is just and reasonable for Ohio Power to recover the full cost of its purchases from the Martinka mine from its wholesale ratepayers;

(2) the Commission's fuel adjustment clause regulation [4] creates only a presumption which does not preclude the Commission from considering the reasonableness of Ohio Power's fuel costs;

(3) Ohio Power's coal costs are subject to a comparable market price test as adopted in Opinion No. 133 [5] to determine the reasonableness of those costs; and

(4) the comparable market price evidence presented to show that Ohio Power's costs were not reasonable was not credible.

The judge concluded that the prices paid by Ohio Power for Martinka coal were reasonable.

Briefs on exceptions to the initial decision and briefs opposing exceptions were filed by Ohio Power, Commission trial staff (staff), and the Municipal Wholesale Electric Consumers of Ohio Power (the municipals).[6]

Ohio Power excepts to the judge's ruling on the preemptive effect of section 318 of the Federal Power Act

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[4] 18 C.F.R. § 35.14(a)(7) (1986).

[5] *Public Service Company of New Mexico (New Mexico)*, 17 FERC ¶ 61,123 (1981), *appeal pending sub nom. Public Service Company of New Mexico v. F.E.R.C.*, Nos. 82-1148, 84-1624 and 84-1677 (10th Cir., filed Feb. 3, 1982).

[6] On May 15, 1986, New England Power Company (NEP) filed a motion with the Commission for permission to file an *amicus curiae* brief in this proceeding; our staff, the municipals, the Town of Norwood, Massachusetts, the Attorney General of Rhode Island, and the Rhode Island Division of Public Utilities and Carriers oppose NEP's motion. Because of the lateness of the filing without good cause the Commission shall deny the motion.

and section 35.14(a)(7) of the Commission's regulations on the Commission's review of Ohio Power's coal costs. Ohio Power argues that the Commission can change its regulations only prospectively. Ohio Power also objects to the imposition of a comparable market price test on a utility subject to PUHCA asserting that the result would be a lower of cost or market price test, a result which Ohio Power asserts would be confiscatory. Ohio Power further urges that as a factual matter Ohio Power's ownership of affiliate mines serves the purpose of delivering the lowest priced electricity possible. Staff and the municipals except to the judge's rejection of staff's evidence as a reliable determinant of comparable market prices.

We affirm the judge's rulings and reasoning regarding the Commission's authority, pursuant to the Federal Power Act and our regulations, to determine the reasonableness of coal costs Ohio Power recovers from its wholesale customers. We disagree, however, with the judge's finding that those costs were reasonable. We find the costs Ohio Power has recovered for its purchases of Martinka coal are unreasonable when compared with market prices and that Ohio Power therefore must refund amounts collected since the effective date of the rates in this proceeding that exceed the comparable market price.

II. Discussion

A. Commission Jurisdiction to Review Ohio Power's Coal Costs

1. Section 318 of the Federal Power Act

Ohio Power urges that under PUHCA and section 318 of the Federal Power Act, the SEC has exclusive jurisdiction over the pricing of the affiliate Martinka coal.[7] The presiding judge concluded that section 318 of the

[7] Ohio Power brief on exceptions at 17-36.

Federal Power Act[8] does not preclude this Commission from determining whether it is just and reasonable for Ohio Power to recover from its wholesale customers, in its rates, the full cost of its purchases from the Martinka mine.[9]

The source of the SEC's authority to regulate the price at which Ohio Power purchases coal from its subsidiary is section 13 of PUHCA.[10] Ohio Power contends that section 13(b) of PUHCA mandates that it purchase coal from its subsidiary at cost.[11] Ohio Power contends that if the Commission orders that Ohio Power may recover in rates only a market-based amount for the Martinka coal, that Ohio Power will face conflicting regulation by the SEC and the Commission which is prohibited by section 318 of the Federal Power Act. Section 318 provides:

> If, with respect to the issue, sale, or guaranty of a *security* . . . , *or any other subject matter*, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 . . . and to a

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[8] 16 U.S.C. § 825q (1982).

[9] 25 FERC at p. 65,183.

[10] 15 U.S.C. § 79m (1982).

[11] The relevant portions of section 13(b) of PUHCA, 15 U.S.C. § 79m(b) (1982), provide:

> [I]t shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company . . . to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [Securities and Exchange] Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.

> requirement of this Act . . . the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act . . . *with respect to the same subject matter*, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person. (Emphasis supplied.)

The judge concluded that, assuming the SEC set the price at which Ohio Power may purchase its subsidiary's coal, there was no conflict of jurisdiction because the SEC regulates the intra-corporate price of coal between Ohio Power and its subsidiary, while this Commission sets rates.[12] The judge concluded that the same subject matter is not subject to the requirements of both PUHCA and the Federal Power Act.[13] We agree with the judge.

First, it is not clear that the SEC requires Ohio Power to purchase coal from its subsidiary at cost, rather than at market price. The SEC orders which Ohio Power cites for this proposition state that the charges for the coal "will be based on actual cost," [14] and "will not exceed the cost thereof to seller." [15] These orders authorized financing for the coal mining subsidiary. They do not appear to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price.

The SEC's Rule 92 implements in part section 13 of PUHCA. The rule prohibits a subsidiary of a registered holding company from selling

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[12] 25 FERC at p. 65,183.

[13] *Id.*

[14] SEC 1935 Act Release No. 17383, Dec. 2, 1971.

[15] SEC 1935 Act Release No. 21537, April 25, 1980.

> any goods produced by it to any associate company thereof, or enter into any contract to do so, at a price which exceeds the price at which the purchasers might reasonably be expected to obtain comparable goods elsewhere, or to finish them itself, giving due regard to quality, quantity, regularity of supply, and other factors entering into the calculation of a fair price.[16]

Thus it appears that not only does the SEC not require a cost-based price for the subsidiary coal, the SEC may require a market-based price for subsidiary coal if the market price is lower than cost.[17]

More importantly, assuming that the SEC has actually affirmatively set the price which Ohio Power must pay its subsidiary for the Martinka coal, setting the intra-corporate price and setting rates are not the same subject matter which would bring section 318 into play. We have taken full account of the fact that the SEC has jurisdiction, under PUHCA, to regulate the price of coal purchased by Ohio Power from the Martinka mine. The

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[16] 17 C.F.R. § 250.92 (1986).

[17] The SEC can, pursuant to section 13(b), authorize a market-based price for a transaction between a subsidiary and parent even when that market-based price exceeds cost. *See*, New England Electric System, 1935 Act Release No. 22309, 24 SEC Docket (1981), where the SEC, pursuant to the provisions of section 13(b), exempted a contract from the cost limitation of 13(b) so that a market-based approach could be used. Thus Ohio Power could apply to the SEC for approval of a market-based pricing mechanism for its affiliate coal if it so desired. *See also*, "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206 dated July 31, 1978" filed in Docket No. E-9206, on October 27, 1978, at 3. Therefore as a factual matter, it does not appear that Ohio Power is accurate in stating that a company subject to SEC jurisdiction pursuant to PUHCA is required always to sell its products to an affiliate at cost-based prices.

SEC's jurisdiction, however, does not extend to setting rates and determining what fuel costs Ohio Power may collect from its wholesale customers. There is thus no conflict in the regulation by the SEC and the regulation by this Commission.[18]

The SEC's Division of Corporate Regulation submitted comments in another Commission case involving AEP affiliate coal purchases in which staff of the SEC explained its view of the effect of SEC orders approving the financing of coal mining subsidiaries under PUHCA.[19] These comments demonstrate that the SEC recognizes that it does not set rates:

> The orders of the SEC under the 1935 Act do not set rates for operating utility companies. There is no conflict with FERC jurisdiction. In setting rates, FERC is legally bound to give due consideration to cost of service, which certainly includes cost of fuel burned, but there are a number of intermediary steps between our order authorizing an affiliate to acquire and mine coal reserves and the rate determination . . . .

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[18] *See Mississippi Industries v. F.E.R.C.*, 808 F.2d 1525, 1550-51 (D.C. Cir. 1987). Appalachian Power Company, another AEP owned utility, raised the same contention regarding SEC regulation in *McDowell County Consumers Council, Inc. v. American Electric Power (McDowell County)*, Docket No. E-9206. The Commission, in setting AEP's coal purchasing practices for investigation, responded that its investigation was "instituted for the purpose of fulfilling this Commission's statutory obligation as expressed in Sections 202, 205, 206, 301, 306, 307 and 309 of the Federal Power Act which are in no way repugnant to the exercise of any authority which the SEC may choose to assert under its statute." *See* 54 FPC 361, 363 (1975).

[19] "Comment of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206, dated July 31, 1978."

> The SEC pricing orders are final orders directed, in conjunction with the 1935 Act and the pertinent rules, to fixing a pricing formula until further order of the Commission. It is the rate making authority, not the SEC, that has jurisdiction to try issues, both of fact and of interpretation, in applying such orders, insofar as material, to a particular rate case.

Moreover, the SEC itself, as opposed to its staff, has recognized that its regulation of fuel-related costs, pursuant to section 13(b), is not in conflict with and does not preclude this Commission setting rates. In *New England Electric System* the SEC authorized a joint venture in which a registered holding company and two of its subsidiaries would participate in building a coal-fired collier. The SEC, pursuant to section 13(b), exempted the transaction from the cost limitations of 13(b), so that the transportation approved by the SEC was at a market-based price which was expected to exceed cost. The SEC commented on the relationship of its regulation under section 13(b) of PUHCA and this Commission's rate regulation:

> We cannot assess now, when the vessel is under construction, the extent to which the price to be determined under the charter will exceed cost under Section 13(b). Nor are we inclined to reserve jurisdiction over the adjustments and redefinitions under the charter as they develop over the next quarter century. The charter with NEPCO has other regulatory effects, not under the Act we administer, that in this case better serve the purposes and allay our concern.
>
> NEPCO is engaged in the production, transmission and sale, at wholesale, of electric energy, essentially to the utility associate companies in the NEES system. It is a public-utility as defined in section 201(e) of the Federal Power Act and its rates are subject

> to FERC jurisdiction under section 206 thereof. The rates allowed to NEPCO include, as a cost of service, its cost of fuel, which as allowed to NEPCO may include either the entire cost of transportation under the joint venture's charter to NEPCO, if FERC should determine that it is just and reasonable, or some other amount.
>
> Our grant of the exemption does not affect FERC's authority over rates; and the bilateral arrangement under the charter following upon the exemption does not prescribe what should be allowed to NEPCO in revenues from its wholesale power customers for transportation costs, either in allowed rates or under the fuel adjustment clause. These adjusting effects provide us sufficient assurance to determine that the exemption from cost remains consistent with the policy of section 13(b). In relying on this ratemaking process we do not cede any of our statutory responsibilities to another agency.[20]

We believe that the SEC's analysis that its determination pursuant to section 13(b) of PUHCA does not affect our authority to make rate determinations is in accord with the presiding judge's conclusion that the SEC's regulation pursuant to section 13(b) of PUHCA does not preclude this Commission from determining the reasonableness of Ohio Power's coal costs during the ratemaking process. We shall affirm the judge's determination on this issue.

2. Section 35.14(a)(7) of the Commission's Regulations

Ohio Power contends that section 35.14(a)(7) of our regulations[21] precludes this Commission from looking at the price of the Martinka coal because that coal is sub-

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[20] 24 SEC Docket at 307-08.

[21] 18 C.F.R. § 35.14(a)(7) (1986).

ject to SEC and Ohio PUC regulation. Section 35.14 (a)(7) provides in part that "where a utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause." Ohio Power argues that we cannot change the regulation without notice to those affected.[22]

The judge concluded that section 35.14(a)(7) creates a rebuttable presumption of reasonableness.[23] We agree. As the judge noted, in 1975, six months after promulgation of section 35.14(a)(7), the Chairman of the Federal Power Commission submitted a letter to the Senate Subcommittee on Reports, Accounting and Management, stating that section 35.14(a)(7) creates a presumption of reasonableness, not a conclusive finding of reasonableness. There is thus no retroactive change of a regulation involved in this case.[24]

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[22] Ohio Power brief on exceptions at 57.

[23] 25 FERC at p. 65,184.

[24] ABP, and its affiliates, had actual notice of the Commission's belief that section 35.14(a)(7) of its regulations does not preclude a comparable market-price investigation into its affiliate coal purchases. The same issue was involved in *McDowell County*. Eight months after promulgation of section 35.14(a)(7), the Commission instituted an investigation of AEP's coal purchasing practices, including its purchases from affiliate coal companies which were subject to SEC regulation. 54 FPC 361 (1975). The Commission ordered that the investigation "include all coal contracts whether or not required to be submitted pursuant to Commission Order No. 517, 52 FPC 1304," the order promulgating section 35.14(a)(7). The Commission later ordered hearings on the coal cost issue pursuant to sections 205 and 206 of the Federal Power Act. 15 FERC ¶ 61,257, at p. 61,592-93 (1981).

Moreover, the SEC had made its determination before this proceeding was set for hearing at this Commission. Had the Commission considered the SEC determination to be conclusive, as Ohio Power contends, the issue of Ohio Power's coal costs would not have been set for hearing.

B. Determining the Reasonableness of Ohio Power's Affiliate Fuel Purchases

Prior to Opinion No. 133 the reasonableness of affiliate coal purchases were determined on a cost-of-service basis. Under the Commission's regulation at section 35.14(a)(7), affiliate coal purchases which were subject to the regulation of another agency were deemed to be reasonable. If the affiliate transactions were not subject to the regulation of another agency, the utility was required to justify the reasonableness of the cost of the affiliate coal.

In Opinion No. 133, the Commission tested the reasonablenes of prices of affiliate coal purchases by comparing them to prices available from non-affiliated suppliers in a competitive market. The Commission found that "the interests of consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier." [25]

Although the Federal Power Act does not mandate a market-price test to determine the reasonableness of affiliate transactions, there is no legal impediment to the use of such a test,[26] and there are a number of reasons arguing for its use. The Commission noted in Opinion No. 133 that companies that are subject to the competitive market are more efficient and innovative than those assured of a recovery of costs and a reasonable return, and that a market-price limitation on fuel expense recovery from affiliated suppliers provides the best incentive for

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[25] 17 FERC at p. 61,246.

[26] It is noteworthy that the Natural Gas Policy Act, 15 U.S.C. §§ 3311-3432 (1982) establishes the comparable market price as the ceiling for a just and reasonable amount a pipeline may pay an affiliated producer for gas. *See* section 601(b)(1)(E), 15 U.S.C. § 3431(b)(1)(E) (1982).

utilities to develop the least costly sources of fuel.[27] In addition to the economic efficiency prompted by a market-price test, it provides protection from the prospect of self-dealing that arises in transactions between affiliates. What the Commission noted in stating the purpose of the comparable market-price test required by the Natural Gas Policy Act, for transactions between pipeline affiliates, is equally applicable to purchases from affiliates by electric utilities: "At the heart of section 601(b)(1)(E) is the simple notion that a pipeline may not grant a price preference to its affiliate."[28] In a *New Mexico* proceeding subsequent to Opinion No. 133, the Commission characterized the comparable market-price test as "an objective test" that prevents rate manipulation.[29] It provides a substitute for the arms-length negotiations that provide objectivity and fair dealing in non-affiliate transactions.

The Commission has not deviated from its continued support for a market-price test. As recently as 1985 the Commission reaffirmed its departure from a cost-based test of reasonableness for affiliate transactions. The enunciation of the market-price test in Opinion No. 133 was given by the Commission as its reason for terminating a 1979 rulemaking that had proposed to amend section 35.14(a)(7) to delete the provision deeming reasonable coal costs that were subject to the jurisdiction of another regulatory agency and to require that utilities file affiliate coal contracts regardless of jurisdiction by another agency.[30] The Commission, noting that the amendment

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[27] 17 FERC at p. 61,246.

[28] *El Paso Natural Gas Company*, 23 FERC ¶ 61,216, at p. 61,449 (1983).

[29] Opinion No. 164, 23 FERC ¶ 61,218, at p. 61,457 (1983).

[30] Termination of Rulemaking Dockets, 50 Fed. Reg. 24,779 (June 13, 1985), *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,409, at p. 33,169; Revision of Fuel Cost Adjustment Clause Regulations Relating to Fuel Purchases from Company-

to its regulations was proposed to effect the cost-based policy in effect when the proposal was issued, found that the filing of contracts was no longer necessary because of the departure from that policy and the adoption of a market-price test.[31]

Under a market-price test, the question in this proceeding is whether the price at which Ohio Power purchased Martinka coal from its affiliate is reasonable when compared with prices in the market for alternative supplies.

1. Establishing Comparable Market Prices

To establish a benchmark market price, staff identified other coal-fired electric generating plants within 50-, 75- and 100-mile radiuses of the Mitchell plant that use coal with sulfur content and Btu heat content comparable to that used at Mitchell,[32] and calculated the weighted average prices of contract coal delivered to those plants. The prices were taken from FERC Form 423 and were increased by 3.1%.[33]

Owned or Company-Controlled Sources, 44 Fed. Reg. 28,683 (May 16, 1979), *FERC Statutes and Regulations, Proposed Regulations 1977-81* ¶ 32,022.

[31] *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,409, at p. 33,169.

[32] *See, e.g.*, Ex. 13, Ex. 15 at 13-22, Tr. at 992-93. There is a high concentration of coal-fired electric plants in the vicinity of the Mitchell plant.

[33] Form 423 was designed to collect data on the cost and quality of fuel used for generating electricity. Among other things, the data facilitates comparison of the costs of captive and non-captive coal. *See* Change in Public Availability of FPC Form 423—Data on Cost and Quality of Fuels for Electric Plants, Docket No. RM77-2, 44 Fed. Reg. 21,596 (April 10, 1979), 6 FERC ¶ 61,208, at p. 61,520 (1979). The increase of 3.1% from the prices reported in Form 423 is based on a one-month audit by the Energy Information Administration of the Department of Energy which found that reporting utilities had understated their costs by this percentage.

The prices compared are the delivered prices, thus including the costs of transportation. Staff's study shows that there are no significant differences between the weighted average cost of comparable coal delivered within 50 miles of Mitchell and the cost of such coal delivered within the 75- and 100-mile radiuses. Staff ultimately relied, therefore, on prices within the 50-mile radius to establish the comparable market price. Within that radius, there were 13 plants which burned coal with a sulfur content of 1-4%, the range of sulfur content in the coal burned at Mitchell (including Martinka coal and other coal).

The average prices of the coal at the 13 plants in staff's study and the prices Ohio Power paid for Martinka coal are as follows:

	*Comparable Coal (1-4% sulfur)**	*Martinka Coal*	*Percentage Difference*
1980	123.2MMBtu	184.9¢/MMBtu	50%
1981	138.4	268.7	94%
1982	155.4	206.8	33%

* Adjusted up by 3.1% from Form 423 data.

(a) Characteristics of Comparable Coal

A comparable market price is the price of coal that is suitable for use at the plant in question, even if it is not identical to the coal from the affiliated supplier. If a certain characteristic of coal renders it unsuitable for use at a particular plant, it may nevertheless be suitable for purposes of price comparison, if the characteristic in question does not affect prices in the marketplace.

Staff limited its analysis of coal contracts to those for coal with heat content and sulfur content similar to that of coal now burned at the Mitchell plant because these are the two characteristics of coal that most significantly affect prices in the marketplace.[34] Ohio Power has estab-

[34] Ex. 13 at 12.

lished that coal with a high ash-fusion temperature is essential to the efficient operation of Mitchell Unit No. 2.[35] Martinka coal has such a characteristic.[36] However, Ohio has not established that ash-fusion temperature of Martinka coal commands a premium in the marketplace over coal with lower ash-fusion temperatures. It is therefore irrelevant for purposes of establishing comparable prices that the precise ash-fusion temperature of the coal included in staff's set of comparable contracts is unknown. We note however, that staff's evidence indicates that coal burned at neighboring plants with dry bottom boilers, such as Mitchell's, which generally require coal of higher ash-fusion temperature, does not command a price premium over coals burned at neighboring plants with wet bottom boilers.[37]

On the other hand, the captive coal may have characteristics that increase its price in the marketplace, but are not required for the boiler. The Mitchell plant was designed to burn coal with more than 4% sulfur content, and meet the emission standards of the Environmental Protection Agency.[38] Martinka coal has a sulfur content of approximately 1.5%.[39] The record in this case is clear that Ohio Power switched to Martinka coal in Mitchell Unit No. 2 because of its higher ash-fusion temperature, not because of its lower sulfur content.[40] Some of Ohio Power's witnesses suggest that the low sulfur content of

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[35] 25 FERC at p. 63,060, Ex. 4 at 17.

[36] *Id.*

[37] We also note that it is clear from the record that coal with ash-fusion temperatures that met Ohio Power's bid specifications was available at prices lower than Ohio Power paid for the Martinka coal. *See* Section II.B.1(e) of this Opinion.

[38] 25 FERC at p. 65,189, Ex. 3, at 10, Ex. 15 at 13.

[39] *See, e.g.*, 25 FERC at pp. 65,182, 65,189, Ex. 15kk at 12, Ex. 3 at 22, Ex. 15 at 6.

[40] *See, e.g.*, 25 FERC at p. 65,181, Ex. 4 at 17.

Martinka coal renders it more desirable for environmental reasons than the non-affiliate coals with higher sulfur content also burned at Mitchell.[41] However, there is no evidence that it is required. Ohio Power's use of low sulfur coal at Mitchell appears to be fortuitous.

As described above, staff developed its benchmark price based on coals with 1-4% sulfur content from 13 plants. Of the 13 plants, eight plants used coal with a range of 1-2% sulfur content, comparable to the 1.5% sulfur content of Martinka coal.[42] If it were clear that there were no benefits from the use of low sulfur coal at the Mitchell plant, a proper sample would exclude coals with 1-2% sulfur content. It appears there are no appreciable benefits in terms of the efficiency of the boiler's operation. However, while the low sulfur coal is not required to meet environmental standards, there may be environmental benefits from its use. We find that the use of coals with 1-4% sulfur content is a reasonable compromise.

(b) Characteristics of Comparable Contracts

Ohio Power objects that the prices used by staff are derived from contracts that were executed at different times than the date of its contract with its affiliate mine. Furthermore, the contracts are of different lengths of

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[41] *See, e.g.*, Ex. 4 at 15-21.

[42] Staff calculated a comparable market price based on the coal from the eight plants which used the 1-2% sulfur coal. As can be seen, the coal at these plants was also less costly than Martinka coal:

	*Comparable Coal (1-2% sulfur)**	*Martinka Coal*	*Percentage Difference*
1980	141.0¢/MMBtu	184.9¢/MMBtu	31%
1981	152.9	268.7	76%
1982	176.0	206.8	18%

* Adjusted up by 3.1% from Form 423 data.

time than the term of the contract with its affiliate. In Opinion No. 133, the Commission recognized that the long-term reliability of a contract with an affiliate, and the market conditions at the time a long-term contract is negotiated, are circumstances that might justify differences in the prices of coal that otherwise has comparable characteristics.[43] In a competitive market, prices fluctuate in response to supply and demand, and to changes in the purchasing power of the dollar. Therefore, spot prices today may not be comparable to the prices derived from a 35-year contract executed 10 years ago.[44] Long-term contracts executed in a soft market, i.e., when supply is greater than demand and prices are depressed, would likely yield lower prices than contracts entered during a period of tight supply and high demand, even though the coal involved is identical in price-affecting characteristics.

Ohio Power argues that the contracts in staff's study were inappropriate in terms of contract vintage. Ohio Power asserts that, to establish a market price, the Commission should look only at contracts entered into at the same time as its Martinka contract.[45] Seventy-five percent of the contracts in staff's study were entered into after the Martinka contract.[46] The 1970s were a period of almost continuous inflation. Contracts made later in the decade, after the Martinka contract, would likely reflect higher prices. Staff therefore argues that its use of later-vintaged contracts tended to produce average prices above the level that would be truly comparable to the Martinka contract.[47]

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[43] 17 FERC at p. 61,246.

[44] Ohio Power's contract for Martinka coal was executed in 1972 for a term of 35 years.

[45] Ohio Power brief opposing exception at 53-54.

[46] 25 FERC at p. 65,197; Ex. 15 at 15, Ex. 15RR at 5.

[47] Staff brief on exceptions at 60 n.30.

Ohio Power's witness, Mr. Renton, testified that the coal market was "soft" from late 1971 until early 1973.[48] Supply exceeded demand and prices were low. Ohio Power's contract for Martinka coal was dated October 1, 1972, in the midst of the soft market. The Arab oil embargo and sharp increases in the world price of crude oil in 1973 apparently caused a "tight" coal market, and prices moved higher.[49] Mr. Renton characterized the market as soft from late 1974 through early 1979, followed by a tight market for a brief period in 1979 through the first part of 1980.[50] This testimony does not indicate any circumstances in the coal market when the Martinka coal contract was made that would justify unusually high prices. Nor does it indicate that prices derived from later-vintaged contracts are likely to be lower than prices reflecting the 1972 market conditions.

Staff utilized a statistical analysis technique to attempt to discern a correlation between the prices paid under its set of comparable contracts and the vintages of those contracts. Its analysis failed to show any consistent, discernible correlation.[51] The judge ultimately concluded that vintages could affect the prices, and should be looked at carefully.[52] We agree. The parties have adequately considered the possible effects of vintage on the prices derived from staff's set of comparable contracts. The only conclusion we can draw is that staff's benchmark prices may be higher, i.e., skewed in favor of Ohio Power, than if only contracts of the Martinka vintage were used for comparison.

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[48] Tr. 639-41.

[49] Tr. 641.

[50] Tr. 642-43.

[51] 25 FERC at p. 65,187, Ex. 13G at 15.

[52] 25 FERC at p. 65,199.

Ohio Power presented evidence of correlations between higher prices and larger quantities of coal delivered under a contract, and between higher prices and contracts of longer duration.[53] The reliability of the data used to show these correlations and the validity of the conclusions drawn were contested by staff. The judge declined to draw any conclusions from the welter of conflicting testimony on these contentions.[54] Staff points out that Ohio Power failed to quantify what adjustments to staff's benchmark prices would be warranted if Ohio Power's alleged correlations were accepted.[55] We are likewise unable to conclude on the basis of the record evidence that the asserted correlations exist, or if so, what adjustments to the benchmark prices they would warrant.

(c) Other Measures of Comparability

(i) Mine-mouth plants

Ohio Power argued that mine-mouth plants should be excluded from the set of contracts used by staff in developing the benchmark prices because the delivered prices of coal to such plants would not include any significant transportation costs, while the delivered prices to the Mitchell plant include such costs.[56] In order to test Ohio Power's claim, staff excluded mine-mouth plants burning 1-4% sulfur coal within 50 miles of Mitchell and found that the average price was slightly lower in 1980 (—2.7¢/MMBtu or 2.3% lower), and slightly higher in 1981 (+0.1¢ or 0.1% higher) and 1982 (+3.0¢ or 2.0% higher). Staff's analysis shows that the delivered prices of coal to mine-mouth plants are not significantly different from delivered prices to the other plants in the

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[53] 25 FERC at p. 65,199, Ex. 9H at 9-15.

[54] 25 FERC at p. 65,199.

[55] *See, e.g.*, Staff brief on exceptions at 61-62, n.30, 73-74.

[56] Ex. 9F, *see also* Ohio Power brief opposing exceptions at 49.

region.[57] Therefore, we find staff's inclusion of mine-mouth plants in its set of comparable contracts acceptable.

(ii) Transportation costs

Ohio Power questioned staff's reliance on delivered prices to plants other than Mitchell without considering the possible effects of differing costs of transportation. Ohio argued that the delivered price of some alternative coal supply might be higher (or lower), if delivered to the Mitchell plant rather than some other plant in the region, if the transportation costs are different.[58] However, the marginal differences in the costs of transporting coal to any point within a 50-mile radius are likely to be small, and there is no reason to anticipate that the average of any such differing costs to other plants would be lower than the transportation costs of shipping coal to the Mitchell plant.[59]

(iii) Geographical area

Ohio Power argues that if staff's 100-mile radius were slightly extended it would then include three more plants whose coal prices would significantly increase the averages and that "a natural break in the chain of substitution" occurs just beyond the extended radius.[60] Staff points out that two of the plants Ohio Power wants to include in the sample burn coal with less than 1.0% sulfur and would thus be outside the range of comparable coal. The coal prices at the other plant are only slightly higher than the average of those within the 100-mile radius.[61]

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[57] *See, e.g.*, Ex. 136 at 17-18, Ex. 15QQ at 3.

[58] Ohio Power brief opposing exceptions at 50.

[59] Differing transportation costs would have to be considered if benchmark prices were derived from only one or two comparable contracts.

[60] Ohio Power brief opposing exceptions at 48.

[61] Ex. 15QQ at 1-3.

Drawing a line at 50 miles or 100 miles obviously involves an element of discretion. If a 100-mile radius is reasonable, it is unlikely that a 105-mile radius would be unreasonable. But once the line has been drawn, and there are reasonable arguments to support where it is drawn, the burden is on a challenger to demonstrate convincingly that the line should be drawn elsewhere. Ohio Power's proposal to include one more plant using coal with comparable sulfur content does not carry that burden.

We find that the presence of 13 plants within 50 miles that burn coal with price-affecting characteristics suitable for use at Mitchell provides an adequate sample of the relevant market by which to compare Martinka prices.

(iv) Price premium for affiliate supply

Ohio Power claimed that, in comparing affiliate coal prices with market prices, affiliate coal prices should be adjusted to reflect a price premium warranted by the security and reliability of an affiliate coal supply.[62] Ohio Power, however, makes no attempt at quantifying this price premium. In fact, the evidence indicates that, at least during the 1981 coal strike, the supply of Martinka coal was not as reliable as Ohio Power alleges it to be. We have considered the reliability premium argument raised by Ohio Power, but find that the company failed to meet its burden of demonstrating that such a premium is warranted.

(v) Mine type

Finally, Ohio Power argues that staff's inclusion of stripmine coal in its sample tends to produce a lower average price than if only coal from underground mines were considered. Ohio Power asserts that coal from un-

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[62] Ohio Power brief opposing exceptions at 60-62.

derground mines is generally more expensive than otherwise comparable coal from strip mines.[63] However, staff's evidence shows that the strip-mine coal in its sample was more costly than the coal from underground mines.[64] Even if Ohio Power's assertion is generally true, there is nothing in the record to justify paying a premium for coal from an underground mine if suitable coal is available at less cost from a strip mine.

(d) Average Price versus Range of Prices

Ohio Power argues that when a set of contracts are identified as comparable, the prices under these contracts should be viewed as establishing a range of reasonable prices. If prices under the affiliate contract fall within the range, they should be deemed reasonable. If they are above the highest prices in the range, refunds should be required to bring the affiliate contract prices down to the highest prices in the range, but no lower.[65] The effect of Ohio Power's approach would be to make the contract with the highest prices the benchmark, and to disregard prices under the other contracts. However, we cannot ignore the other contracts in the group unless the similarities between the affiliate contract and the contract with the highest prices are so striking, and the dissimiliarities of the other contracts in the group so significant that the highest-paid contract should clearly serve as the benchmark. Ohio Power did not argue that its Martinka contract was strikingly similar to the highest priced comparable contract.

Moreover, the use of a weighted average price is a convention frequently employed to establish a reasonable midpoint.[66] It is more appropriate than relying on the highest-priced coal under any reasonably comparable con-

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[63] Ohio Power brief opposing exceptions at 61.

[64] Ex. 15QQ at 3-5, Ex. 15RR at 6-7.

[65] Ohio Power brief opposing exceptions at 4, 13-17.

[66] *See Tennessee Gas Pipeline Co.*, 38 FERC ¶ 61,306 (1987).

tract to set the market standard and effectively ignoring all other lower prices under other reasonably comparable contracts.

(e) Ohio Power's Market Price Evidence

Ohio Power submitted evidence of its bid solicitations in 1980 and 1981 for Martinka-quality coal and the responses from independent coal suppliers.[67] Current bids are not likely to reflect the same factors affecting prices under the contract for Martinka coal, signed 10 years earlier, and original bids are likely to be higher than finally negotiated contracts. Nevertheless, we agree with the judge that evidence of current bids is relevant to discerning current market prices.

Staff notes that the average delivered price of the six lowest bidders in 1980 was roughly $1.42/MMBtu.[68] This compares to the $1.41 adjusted benchmark price that staff derived from its set of comparable transactions (for 1-2% sulfur content coal) while Ohio Power paid $1.85/MMBtu for Martinka Coal.[69] The 1981 solicitation identified seven suppliers who bid to supply low sulfur coal (comparable to Martinka), with ash-fusion temperatures and other characteristics that met Ohio Power's bid specifications, at an average delivered price of roughly $1.54 per MMBtu.[70] This compares to staff's conclusion that the comparable market price for low sulfur coal (1-2%) that year was $1.53, while Ohio Power paid $2.69 for Martinka coal.[71] Thus, Ohio Power's bid

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[67] Ex. 15DD.

[68] Staff brief on exceptions at 42.

[69] *See* n.42, *supra*.

[70] Staff brief on exceptions at 43, Ex. 15LL at Sch. 6.

[71] *See* n.42, *supra*. The judge noted that the Martinka mine was closed during part of 1981 because of a strike and other operating difficulties. 25 FERC at p. 65,182. Because Ohio Power's contract

evidence can be viewed as supporting staff's position on comparable market prices.

The judge said that the 1980 and 1981 bid solicitations lead to the conclusion that Martinka-quality coal could have been obtained at a cheaper price than was paid by Ohio Power.[72] However, he found this conclusion to be tempered by the fact that the market may have been soft in those years.[73] The average price of 22 offers made in 1980 ($1.58/MMBtu) compares to staff's adjusted weighted average price of $1.41/MMBtu for low-sulfur coal used within a 50-mile radius. In 1981, Ohio Power's average of 20 offers ($1.76/MMBtu) compares to staff's comparable benchmark price of $1.53/MMBtu. However, the judge's ultimate conclusion that Martinka prices "are not too bad" was based on his comparisons of the $40 per ton (converted from cents per MMBtu) average of the 1980 bids to the $44.10 per ton paid for Martinka coal and the $45 per ton average of the 1981 bids to the $48 per ton paid for Martinka coal in 1982 (substituting 1982 Martinka prices for 1981 prices to avoid the distortions caused by the strike).[74]

We think the prices from the lower bids are more indicative of market prices. Bids are indicative of market prices to the extent they are likely to be accepted and form the prices for transactions. Actual transactions are more likely to develop from among the range of lowest bids. Consequently, we believe staff's average of the lower bids is more indicative of current market prices

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obligates it to pay the Martinka mine's fixed costs regardless of the amount of production, Tr. 734, the unit cost of Martinka's coal was abnormally high in 1981. Therefore, the bid prices averaging $1.54 might be more properly compared to the $2.07 paid for Martinka coal in 1982.

[72] 25 FERC at p. 61,195.

[73] *Id.*

[74] *Id.*

than the average of all bids used by the judge as the basis for his conclusions.

Ohio Power also identified four coal seams owned by independent coal suppliers, within a 75-mile radius of the Mitchell plant, that could provide Martinka-quality coal.[75] Ohio Power compared the weighted average prices of coal from this sample of mines to show that Martinka coal was $6.89 per ton more expensive in 1980, and $17.82 more expensive in 1981 (the abnormal year), but $6.08 per ton less expensive in 1982.[76]

Ohio Power's study was offered to show the reasonableness of the cost of Martinka coal but not to serve as the basis for repricing the coal.[77] However, even if it had been offered for the purpose of establishing a comparative market price, we would not find it adequate. There is substantial evidence that the relevant geographic market based on the location of mines rather than proximate coal-fired plants would approximate the geographic boundary of the Department of the Interior Bureau of Mines Districts Nos. 1-8, a much larger area than a 75-mile radius. The coal burned in other plants near Mitchell comes from those districts.[78] Ohio Power's bid solicitations went to companies with mines in those districts.[79] Ohio Power argues that coal from beyond 75 miles is usually not competitively priced because of the transportation costs. However, several suppliers from well beyond 75 miles (and within District Nos. 1-8) were among the bidders with the lowest delivered prices.[80] Ohio Power's study focused on prices of relatively small

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[75] Exhibit 4 at 33-39.

[76] Exhibit 4K.

[77] Ex. 4 at 37.

[78] Ex. 15 at 15, 15BB, Ex. 15CC.

[79] Ex. 13 at 15.

[80] Ex. 15LL at Sch. 6.

quantities of coal, and there are several other aspects of the study, as the judge noted,[81] that preclude us from according it weight as an indicator of comparable market prices.

2. Burden of Proof

Under section 205(e) of the Federal Power Act and § 35.13(e)(3) of the Commission's regulations,[82] the utility bears the ultimate burden of proving that its rates are just and reasonable. Application of the burden of proof is described in *Minnesota Power & Light Co.*

> [U]tilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.[83]

The judge in this proceeding found that staff's evidence created a serious doubt as to whether the price paid for Martinka coal was prudent. He stated that Ohio Power "convincingly erased that doubt but did this primarily by attacking the staff's presentation rather than by an affirmative showing of prudence." [84] The judge then found that Ohio Power had satisfied "whatever legal requirement is involved in meeting its burden." [85] We disagree. Ohio Power did not dispel the doubts raised by the staff's evidence and did not prove affirmatively that its fuel costs were reasonable.

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[81] 25 FERC at p. 65,203.

[82] 16 U.S.C. § 824d(e) (1982); 18 C.F.R. § 35.13(e)(3) (1986).

[83] 11 FERC ¶ 61,312, at p. 61,645 (1980). *See also, Anaheim v. F.E.R.C.*, 669 F.2d 799, 809 (D.C. Cir., 1981).

[84] 25 FERC at p. 65,202.

[85] *Id.*

Staff has shown that Ohio Power paid in excess of the market price for the Martinka coal, and Ohio Power did not rebut this showing. Moreover, Ohio Power failed to come forward with evidence that its affiliate coal costs were reasonable in comparison to market prices. As described above, all Ohio Power sought to do was cast doubt on different elements of staff's case. Ohio Power never attempted to show what the market price of coal was and therefore failed to show affirmatively that the prices it paid for the Martinka coal were reasonable. Ohio Power also failed to show that staff's evidence did not establish a market price with which to compare the cost of Martinka coal. We therefore shall reverse the judge's conclusion that Ohio Power met its burden of establishing that its costs were reasonable.

3. Conclusion

Our review of the record leads us to conclude that staff's market study, identifying plants within 50 miles of Mitchell that burn coal of comparable Btu content to that of Martinka coal and with suitable sulfur content (within a one to four percent range), provides a reliable calculation of comparable market prices by which to judge the reasonableness of Ohio Power's Martinka coal costs. The comparison [86] demonstrates that Ohio Power's costs of Martinka coal were 50% above market in 1980, 94% in 1981, and 33% in 1982. We have already considered proposed adjustments to the prices of comparable transactions to account for differences between the Martinka coal and that of comparable or suitable coal. We have considered differences in vintage, quantity, and duration of the contracts, and all other factors that the parties have suggested may justify higher prices for Martinka coal. Ohio Power has not justified disparities of the magnitude noted above.[87]

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[86] *See* chart in section II.B.1. of this Opinion.

[87] We note that Ohio Power's Martinka coal costs have continued to exceed significantly the market price derived from the plants in-

Ohio power suggests that there are many reasons for it to enter into affiliate coal contracts. Among these reasons are the effect of having affiliate coal mines on Ohio Power's ability to negotiate favorable coal contracts with independent coal suppliers. Ohio Power argues that the effectiveness of its coal purchases program is shown by the fact that its electric rates are low in comparison to neighboring utilities' rates. The relative level of Ohio Power's rates, however, is not evidence that its affiliate coal purchases are reasonable. There are a variety of reasons, totally unrelated to coal costs, that a neighboring utility might have differing rates. We therefore are left with a comparison of the Martinka coal prices with market price.

In view of the significance of the deviation between Ohio Power costs for Martinka coal and comparable market prices, we cannot conclude that Ohio Power's purchases of Martinka coal for its Mitchell plant are reasonable costs for its ratepayers to bear. Ohio Power has not submitted evidence which indicates otherwise. We therefore find that Ohio's rates based on those costs are not just and reasonable.

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cluded in staff's study. According to data from FERC Form 423, Martinka's prices have exceeded market by 24.2% to 33.4% in the years 1983 through September 1986. The comparisons are charted below:

	*Comparable Coal (1-4% sulfur)**	*Martinka Coal*	*Percentage Difference*
1983	157.0¢/MMBtu	195.1¢ MMBtu	24.3%
1984	153.4	199.5	30.1
1985	153.9	191.1	24.2
1986**	149.1	198.9	33.4

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* Adjusted by 3.1% for comparison purposes with staff's 1980-82 figures. We have no evidence that the underreporting noted in EIA's one-month audit, and on which staff relied in its calculations, continues to occur.

** Through September.

C. Establishing a Just and Reasonable Fuel Charge

Having determined that Ohio Power's rates are not just and reasonable, the Commission must establish a fuel charge that will result in a just and reasonable rate. This proceeding is distinguishable in this respect from the proceeding in Opinion No. 133. In that case, the Commission affirmed the judge's finding that the price of affiliate coal was reasonable under the market-price test, and it was, therefore, unnecessary for the Commission to establish an allowable price.

In this instance, the Commission believes it is reasonable to use a market price as the benchmark for Ohio Power's future fuel charges for Martinka coal and from which to calculate refunds for overcollections. For the same reasons that a market-price test is approved for determining the reasonableness of the company's proposed charges, it is appropriate to use the market-price to calculate the just and reasonable rate when the company's charges are found unreasonable, particularly in this case where the parameters for determining a comparable market price have been adequately developed in the market price analysis presented by staff.

Ohio Power posed arguments on and opposing exceptions to the initial decision regarding the adverse effects that would result if this Commission reprices its coal at a market price. For instance, Ohio Power argues that if this Commission reprices its fuel according to market price, while the SEC applies a cost-of-service requirement, it will be "whipsawed" by the two commissions.[88] Ohio Power argues that its investment in the Martinka coal mine should not be judged by focusing on a short-term comparison with prices from alternative non-affiliated suppliers. Even if its prices during the early years of the mine's production may be above the market, that relation may not continue. Ohio Power argues that

[88] *See, e.g.*, Ohio Power brief on exceptions at 35, 62.

the payments for Martinka coal, based on costs, may be eventually less than the comparable market prices.[89] Ohio Power states that what may look like a "bad deal" in the short run may prove to be a "good deal" in the long run. However, Ohio Power argues if its charges to its wholesale ratepayers are limited to the market price during the early years of the contract, it will lose money on the transactions if, in the later years when market prices may exceed the cost of producing the captive coal, the SEC limits the affiliate transfer price to costs. Therefore, Ohio Power suggests that it would have no opportunity to recoup the losses it may have incurred in the early years.[90]

Ohio Power argues that the practical effect of having this Commission regulate the transaction with Ohio Power's ratepayers by one standard, while the SEC regulates the transaction with its affiliate by another standard is to limit it to recovery under the lower of the two standards.[91] Ohio argues that this amounts to a partial confiscation of its investment in Martinka, and is unfair and perhaps unconstitutional.[92] It is also detrimental to public policy, Ohio Power argues, because utilities faced with the SEC/FERC "whipsaw" will forego the advantages of captive coal mines.[93]

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[89] The costs which Ohio Power seeks to recover are the equivalent of rate-based regulated costs. Prices under rate-base regulation may be high during the early years of the inclusion of new plant in rate base. As depreciation expense is recovered, the rate base dwindles and the return on the diminished rate base likewise dwindles (if the rate of return is constant). This phenomenon is called the "front-end load effect" of rate-base pricing.

[90] Ohio Power brief on exceptions at 25, 63, 65.

[91] *See, e.g.*, Ohio Power brief on exceptions at 17, 52.

[92] Ohio Power brief on exceptions at 25, 33, 56. Ohio Power brief opposing exceptions at 70.

[93] Ohio Power brief on exceptions at 63.

Ohio Power's argument is misplaced. As noted above, we agree with the presiding judge's conclusion that this Commission regulates rates while the SEC regulates the intra-corporate price of coal and that section 318 of the Federal Power Act does not preclude the Commission from determining the just and reasonable charge for Ohio Power to recover from its wholesale customers for its purchases from the Martinka mine.[94]

The amount that the SEC allows as the transfer price of coal between Ohio Power and the Southern Ohio Coal Company does not dictate the amount that Ohio Power may recover in rates to its customers for fuel costs. This Opinion orders the company to charge ratepayers, at most, the comparable market price for Martinka coal. Although the SEC may limit the affiliate transfer price to costs even when market prices are higher than costs,[95] for electric rate purposes Ohio Power will have the option to charge its wholesale customers up to the market price for that affiliate coal. Consequently, Ohio Power is not, at it alleges, required to limit its rate recovery of Martinka coal costs to the lower of the two standards.

Allowing Ohio Power to collect the market price, even when the market price exceeds costs, is consistent with our holding in Opinion No. 133 where we stated that "the interests of the consumers will best be protected by permitting utilities that purchase coal from affiliates to recover no more from their ratepayers than the price that would have been incurred if a comparable coal supply contract had been made with a non-affiliated supplier."[96] When market prices are lower than costs, tying fuel charges to the comparable market price assures that ratepayers will pay for affiliate coal no more than they would have paid for non-affiliate coal. On the other hand, when

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[94] 25 FERC at p. 65,183.

[95] *But see* n.17, *supra*.

[96] 17 FERC at p. 61,246.

the market price exceeds costs, ratepayers will still be paying no more than what they would pay for non-affiliate coal, and will not be harmed by the affiliate relationship.

Establishing the comparable market price as the allowable fuel charge for affiliate coal supplies in this case will provide an incentive to Ohio Power to ensure that its subsidiary coal company is as innovative and operates as efficiently as possible.[97] The lower the affiliated company's costs, the higher Ohio Power's potential return on investment.

By allowing the collection of the comparable market price, regardless of whether the price is higher or lower than costs, Ohio Power will not be limited to collecting market price only when costs may be higher, which would preclude it from recouping high start-up costs as the costs of mining drop relative to market price. Establishing the reasonable cost of the affiliate coal supply by a comparison with the competitive market allows Ohio Power the same chance to earn a return on investment in its affiliate coal mine as an independent supplier of coal. It is Commission policy that a regulated company should not receive less revenue for its sales due solely to the mere affiliation between supplier and purchaser.[98] Whether or not Ohio Power's commitment to Martinka coal proves to be "a good deal" over the long run will depend on Ohio Power's ability to recover its investment in the mine, plus a reasonable return, without charging its ratepayers for fuel costs in excess of comparable market prices. However, this consideration is irrelevant when a comparable market price is established as a just and reasonable rate. Under the rational of tying affiliate coal costs to the comparable market price, not only must cost

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[97] *Id.*

[98] *Columbia Gulf Transmission Company*, Opinion No. 47, 8 FERC 61,002 (1979), *reh'g denied*, 9 FERC 61,355 (1979).

recovery be limited to the market price when actual costs exceed market price, but fuel charges must be allowed up to the market price, even if actual costs are less. Therefore, if, as Ohio Power argues in this case, its investment in the Martinka coal mine will prove to be a good deal in the long run, it will benefit by recouping losses that result from the refunds of excessive fuel costs required by this Opinion and order.

D. Calculation of Coal Cost Recovery and Refund

The benchmark price mechanism approved and ordered in this Opinion will establish, for Ohio Power's Martinka coal, the market price, which will be the just and reasonable fuel adjustment charge under the Federal Power Act. The Commission will change the benchmark price mechanism only prospectively, if it can be shown that it no longer serves as a valid tool for determining comparable market prices. As ordered below, Ohio Power must calculate refunds and future fuel adjustment clause collections based on the benchmark price mechanism approved in this Opinion. The benchmark price will be based on data from FERC Form 423 and will be derived from the weighted average delivered price of contract coal to plants within 50 miles of the Mitchell plant and having a sulfur content of 1-4% and a Btu content of not less than 11,500 Btus per pound.[99]

Refunds for excessive coal costs collected through the fuel adjustment clause prior to the filed rates in this proceeding are not mandatory. Staff recommends refunds only from the dates that Ohio Power's proposed rates in this proceeding became effective subject to refund—July 29, 1982 for the Wheeling Electric Company, and December 28, 1982 for the municipals.[100]

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[99] The Mitchell plant's boilers require coal of not less than 11,500 Btus per pound. Ex. 15 at 13, Ex. 3 at 36.

[100] The suspension order in these proceedings established these dates. 20 FERC ¶ 61,081 (1982).

The municipals, on the other hand, seek refunds for all of 1980, 1981 and 1982, in addition to excesive fuel costs collected since December 28, 1982. The municipals point out that we have authority to require refunds of any costs previously collected under a fuel adjustment clause, if such costs are found to be imprudent, unjust or unreasonable, regardless of whether such costs were recovered through rates collected subject to refund.[101]

We must determine whether, and if so to what extent, refunds of historical coal costs are warranted in light of the interests of the customer and the utility.[102] For the reasons stated below, we will require refunds for Ohio Power's collections of its Martinka coal costs only after the effective date of the rate increases under these proceedings.

The Commission did not adopt the comparable market-price test for the reasonableness of affiliated coal costs until the issuance of *Public Service Company of New Mexico*, Opinion No. 133, on November 9, 1981. Prior to that date Ohio Power would not necessarily have anticipated that fuel charges within the cost-based limits imposed by the SEC might not be acceptable under this Commission's regulation. No one challenged the reasonableness of these affiliate coal costs until the instant proceeding. As such, no refunds will be ordered for excessive costs collected prior to the effective date of superseding rates in this proceeding.

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[101] *Public Service Company of New Hampshire*, Opinion No. 37, 6 FERC ¶ 61,299 (1979); *Electric Cooperatives of Kansas*, 14 FERC ¶ 61,176 (1981); *Carolina Power & Light Company*, 17 FERC ¶ 61,118 (1981); and *Delmarva Power and Light Company*, 24 FERC ¶ 61,199, at p. 61,461 (1983).

[102] *Second Taxing District of the City of Norwalk v. F.E.R.C.*, 683 F.2d 477, 490 (D.C. Cir. 1982).

The Commission orders:

(A) The initial decision is affirmed and adopted to the extent it is not inconsistent with this Opinion and order. Exceptions to the initial decision not granted in this Opinion are denied.

(B) Ohio Power shall file revised rates in accordance with this Opinion and order, and refund the difference between amounts collected subject to refund and amounts payable under the revised rates. Refunds shall be made with interest, in accordance with 18 C.F.R. § 35.19(a) (1986).

(C) Ohio Power shall file, within 30 days of the date of issuance of this Opinion and order, an amendment to its fuel adjustment clause. This amendment shall specify the method, consistent with paragraph (D), for estimating monthly fuel charges for billing purposes (unless a lagged fuel adjustment is used) and any true-up procedures to adjust for actual data as it becomes available.

(D) Ohio Power shall calculate the comparable market prices for its purchases of Martinka coal for delivery to its Mitchell plant in accordance with the following method and on the basis of data filed with the Commission on FERC Form 423, and may include up to the comparable market price of Martinka coal in calculating that portion of its monthly fuel charge related to fuel costs associated with generation from the Mitchell plant. The comparable market price shall be the weighted average delivered price of contract coal, having a sulfur content of 1-4% and a Btu content of not less than 11,500 Btus per pound, to plants within 50 miles of the Mitchell plant. To the extent Ohio Power calculates the comparable market price on the basis of estimates, for fuel clause purposes it shall adjust its fuel charge on the basis of the data filed with the Commission on FERC Form 423 within six months of calculating any comparable market price on the basis of estimates. Ohio Power

must also revise its demand rates to reflect benchmark prices for Martinka coal used at its Mitchell plant in its Period II working capital estimates.

(E) Ohio Power shall make refunds in accordance with paragraph (B) and implement the procedures required by paragraphs (C) and (D) within 75 days of the date of issuance of this Opinion and order. However, if an application for rehearing is pending at the end of the 75-day period, the refunds shall be made, and the procedures implemented, within 30 days of the date such application is disposed of by the Commission.

(F) The May 15, 1986 motion of New England Power Company to file an *amicus curiae* brief in this proceeding is denied.

(G) Subdocket 000 of Docket Nos. ER82-553 and ER82-554 are hereby terminated. New subdockets will be assigned to Ohio Power's compliance filings required by this order.

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

Docket Nos. ER82-553-002, ER82-553-003, ER82-554,002, and ER82-554-003

OHIO POWER COMPANY

Opinion No. 272-A; Opinion and Order Denying Requests for Rehearing, and Denying Request for Stay

(Issued April 7, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Opinion No. 272 on recovery of the cost of coal purchased from an affiliate issued April 30, 1987, appears at 39 FERC P61,098.]

[Opinion No. 272-A Text]

On April 30, 1987, the Commission issued Opinion No. 272 in this proceeding.[1] The Commission affirmed the presiding administrative law judge's conclusion in the initial decision [2] that the Commission is not precluded by either statute [3] or regulation [4] from determining whether

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[1] *Ohio Power Company*, Opinion No. 272, 39 FERC P61,098 (1987).

[2] *Ohio Power Company*, 25 FERC P63,060 (1983).

[3] Section 318 of the Federal Power Act, 16 U.S.C. § 825q (1982).

[4] 18 C.F.R. § 35.41(a)(7) (1987).

it is just and reasonable for Ohio Power Company (Ohio Power) to recover the full costs of its purchase from the Martinka mine from its wholesale rate payers, and that Ohio Power's affiliate coal costs are subject to the comparable market price test, adopted in Public Service Company of New Mexico, Opinion No. 133,[5] to determine the reasonableness of those costs. The Commission, however, reversed the initial decision by concluding that the costs Ohio Power had recovered for its purchases of Martinka coal were unreasonable when compared with the market price for comparable coal. The Commission ordered Ohio Power to refund amounts collected, as of the effective dates of the rates in these proceedings, to the extent that they reflect a price exceeding the market price for comparable coal.

Ohio Power has filed a request for rehearing. The Utility argues that section 318 of the Federal Power Act and section 35.14(a)(7) of our regulations preclude the Commission from considering the reasonableness of Ohio Power's affiliate coal costs. Ohio Power also urges that the Commission's decision was not based on substantial evidence. Ohio Power believes the Commission should have analyzed its coal purchases using a prudence standard which, it contends, would have resulted in the Commission's approving the utility's affiliate coal costs. Ohio Power further contends: that the comparable market price test in this case is inconsistent with the standard used in Tennessee Gas Pipeline Co.;[6] that the Commission should look at Ohio Power's total coal procurement and utilization program; and that the record shows that Ohio Power's rates are relatively low. Therefore, the Commission should allegedly not be concerned with the reasonableness of Ohio Power's coal costs because it is

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[5] 17 FERC P61,123 (1981), *reh'g denied*, 18 FERC P61,036 (1982), *aff'd*, *Public Service Company of New Mexico* v. *FERC*, 832 F.2d 1201 (10th Cir. 1987).

[6] Opinion No. 269, 38 FERC P61,306 (1987).

the rate and not isolated expense components that must meet the "just and reasonable" test. Ohio Power urges that the Commission should have not ordered refunds because the Commission adopted a novel interpretation of its fuel adjustment clause regulation, extending the market price test of Opinion No. 133 to a utility with above market price coal costs, and because the Commission waited more than three years to reverse the judge's decision that Martinka coal costs were not unreasonable. Ohio Power requests that if the Commission denies rehearing, our refund order should be stayed pending judicial review. Finally, Ohio Power argues that our order has the effect of revising the company's demand rates. The company alleges this is impermissible since those rates were settled earlier in this proceeding.

On June 1, 1987, the Municipal Wholesale Electric Customers of Ohio Power (Municipals) filed a request for rehearing of Opinon No. 272. The Municipals claim that the Commission should have ordered refunds for the period 1980-1982 as well as from the effective date of the rates, December 28, 1982. In addition, they request that the Commission clarify whether refunds are to be based on a market price determined with a 3.1% upward adjustment.[7]

Discussion

The requests for rehearing raise no arguments which warrant changing our decision in these proceedings. We

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[7] As indicated in Opinion No. 272, the 3.1% adjustment was made to compensate for a potential error in the historical data, for purposes of determining whether Martinka coal costs have been excessive. This adjustment was made out of an abundance of caution in assessing the reasonableness of Ohio Power's coal costs. However, in ordering refunds, we directed the utility to calculate refunds using actual data from FERC Form 423 without making any adjustment. 39 FERC at p. 61,289. No further clarification is necessary.

shall, however, address several points raised in the pleadings.

Ohio Power contends that we must conduct a "prudence" analysis in order to assess the reasonableness of its Martinka coal costs. The Commission has already determined in Opinion No. 133 that, as a matter of policy, affiliate coal purchases should be judged by a market price standard, 17 FERC at p. 61,246, and our decision has been affirmed on appeal. 832 F.2d at 1212-14. The utility's argument that we must conduct a "prudence" analysis in the circumstances of this case is without merit.

Ohio Power also argues that our market price test is inconsistent with that used by the Commission in *Tennessee Gas*. In *Tennessee Gas*, we held that in determining the reasonableness of natural gas prices paid to affiliate producers by pipelines, it was appropriate to compare the weighted average price of all affiliate natural gas with prices paid to nonaffiliates by the pipeline and third parties. In this case, we have focused solely on the price paid by Ohio Power for coal from the Martinka mine. The decision in *Tennessee Gas* is inapposite to this case. As Ohio Power admits in its request for rehearing, all pipeline natural gas is fungible, whereas all coal is not. In addition, the question of whether prices paid to affiliated coal suppliers should be averaged, where more than one affiliate relationship is questioned in a particular case, is not present in this proceeding. In any event, Ohio Power has not presented any evidence in support of a determination of market price under the test used in *Tennessee Gas*, and, thus, failed, even under that standard, to dispel the doubts raised by Staff's evidence as to the reasonableness of the price paid by it for coal from the Martinka mine.

Ohio Power's argument that we erred by revising its demand rates is also misplaced. In approving an earlier settlement in this proceeding, we stated that it would

become effective December 28, 1982, not subject to refund as to any issue except to the extent an adjustment is required as a result of the Commission's determination of the captive coal issue. 23 FERC P61,236 (1983). Because the value of Martinka coal as calculated under the market price test affects the amount of fuel stock and working cash included in rate base which, in turn, affects the level of Ohio Power's unit demand charge, our requirement that Ohio Power revise its demand charges is appropriate.

As to Ohio Power's request that we give prospective effect only to our decision, we have already rejected the contention that the application of a market price standard to the facts included in this case represent a change in Commission policy. Ohio Power argues that because it has continued its operation of the Martinka mine pending a final Commission decision, fairness requires that the decision be applied prospectively. The Municipals, on the other hand, request that we apply our decision to coal costs paid prior to the effective date of the rates filed in this proceeding. We carefully considered the interests of both the utility and its customers in Opinion No. 272 in determining that refunds should be ordered as of the date previously chosen, and we find no reason to alter our conclusion in light of the arguments made on rehearing.

Finally, Ohio Power requests that we stay the effect of our order pending judicial review. Section 705 of the Administrative Procedure Act [8] permits an administrative agency to stay its order if it finds that "justice so requires." The inquiry involves a balancing of the various interests involved, including an assessment of whether the party seeking a stay will suffer irreparable harm if the stay is denied. *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 41 FERC P61,288 (1987); *see also Middle South Energy, Inc.*, 32 FERC P61,207

[8] 5 U.S.C. § 705 (1982).

(1985). In support of its request for stay, Ohio Power focuses on the matter of irreparable harm, alleging that if the Commission's decision is reversed, it will be difficult for the utility to recover the refunded coal costs from its customers.

We shall deny the request for a stay. In the event an appellate court reverses our decision, the Commission would be empowered to order Ohio Power to be made whole. The possibility that the utility might experience difficulty in recouping refunds from its wholesale customers does not constitute irreparable injury. *Nantahala Power & Light Co.*, 21 FERC P61,274 (1982).[9] Further, the utility has not shown that the customers will suffer little, if any, harm by delaying the payments of refunds. We believe that the public interests supports the rapid disbursement of refunds.

The Commission orders:

(A) The requests for rehearing of Opinion No. 272 filed by Ohio Power and the Municipals are hereby denied.

(B) The alternative request by Ohio Power for a stay of the Commission's order issued in Opinion No. 272 is hereby denied.

(C) Subdockets -002 and -003 of Docket Nos. ER82-553 and ER82-554 are hereby terminated.

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[9] *See also Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

STATUTORY PROVISIONS
15 U.S.C. § 79m(b)

(b) Contracts by subsidiary or mutual service companies. After April 1, 1936, it shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the Commission by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions (1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public-utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.

16 U.S.C. § 825q

§ 825q. Conflict of jurisdiction

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any

security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 [15 USCS §§ 79 et seq.] or of a rule, regulation, or order thereunder and to a requirement of this Act [16 USCS §§ 791a et seq.] or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 [15 USCS §§ 79 et seq.] shall apply to such person, and such person shall not be subject to the requirement of this Act [16 USCS §§ 791a et seq.], or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935 [15 USCS §§ 79 et seq.], in which case the requirements of this Act [16 USCS §§ 791a et seq.] shall apply to such person.

18 C.F.R. § 35.14(a)(7) (1992)

(7) Where the cost of fuel includes fuel from company-owned or controlled [1] sources, that fact shall be noted and described as part of any filing. Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause. If the current price, however, is in litigation and is being collected subject to refund, the utility shall so advise the Commission and shall keep a separate account of such amounts paid which are subject to refund, and shall advise the Commission of the final disposition of such matter by the regulatory body having jurisdiction. With respect to the price of fuel purchases from company-owned or controlled sources pursuant to contracts which are not subject to regulatory authority, the utility company shall file such

[1] As defined in the Commission's Uniform System of Accounts 18 CFR part 101, Definitions 5B.

contracts and amendments thereto with the Commission for its acceptance at the time it files its fuel clause or modification thereof. Any subsequent amendment to such contracts shall likewise be filed with the Commission as a rate schedule change and may be subject to suspension under section 205 of the Federal Power Act. Fuel charges by affiliated companies which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to be made by the Commission on its own motion under section 206 of the Federal Power Act.

Supreme Court, U.S.
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Nos. 92-264 and 92-280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners,
v.
OHIO POWER COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF ON BEHALF OF RESPONDENTS MILES INC., OLIN CORPORATION, AND PPG INDUSTRIES, INC.

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BRIEF ON BEHALF OF RESPONDENTS MILES INC., OLIN CORPORATION, AND PPG INDUSTRIES, INC.

DESCRIPTION OF INDUSTRIAL RESPONDENTS

This brief is presented on behalf of Miles Inc., Olin Corporation, and PPG Industries, Inc., collectively referred to herein as "Industrial Respondents."[1] Indus-

[1] PPG subsidiaries which are not wholly owned are Belletech Corp., Arkansas Chemical Inc., Quantum Technologies, Inc., Transitions Optical, Inc., AZDEL, Inc., Chemfil Canada, Ltd., Guangdong Float Glass, PPG-Nanchang Chemical Technology Development Corp., PPG Industries (France), Asahimas Subentra Chemical,

trial Respondents were intervenors in the cases below before the Federal Energy Regulatory Commission and the Court of Appeals, including the remand from this Court. Additionally, Industrial Respondents were respondents and participants when this case was previously before this Court and the Court unanimously reversed the D.C. Circuit's ruling. *Arcadia, Ohio v. Ohio Power*, 111 S.Ct. 415 (1990).

Industrial Respondents are large West Virginia industrial retail electric service customers of Wheeling Power Company ("Wheeling"), an entire requirements wholesale customer of Respondent Ohio Power Company ("Ohio Power"). Wheeling and Ohio Power are two of the operating public utility subsidiaries of American Electric Power Company ("AEP").

Industrial Respondents are or have been large employers in the Northern Panhandle region of West Virginia, and provide many jobs to their own employees and to satellite vendors and businesses in their geographical region. Industrial customers of Wheeling consume nearly

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Ampaspace, Industrie Vernici Italiane, Asahi-Penn Chemical Co., Shinnikka PPG Co., Ltd., AZDEL Europe, Dongju Industrial Co., PPG Iberica, PPG Industries Taiwan Ltd., Taiwan Chlorine Industries, PFG Fiber Glass, PPG-Siam Silica Co., Inveca-Pittsburgh and VFG-Sudamtex.

When the Industrial Respondents were previously before the Court in this case, Miles Inc., was named Mobay Corporation and LCP Chemicals, Inc., was then a member of the industrial group.

Olin subsidiaries which are not wholly owned are Aquachlor (Proprietary) Limited, Asahi-Olin Ltd., Chlor-Chem Limited, Empire of Carolina, Inc., Etoxyl, C.A., Hydrochim, S.A., The Industrial Credit and Investment Corporation of India Limited, Indy Electronics, Inc., Judd-Olin (U.K.) Limited, Langenberg Kupfer und Messingwerke GmbH & Co. KG, Nordesclor S.A., OCG Holdings, Inc., OCG Microelectronic Materials AG, OCG Microelectronic Materials Limited, OCG Microelectronic Materials N.V., OCG Micro Electronic Materials S.A., OCG Microelectronic Materials S.r.l., Productora de Alcoholes Hidratados, C.A. (PRALCA), Sukulu Mines Limited and Yamaha-Olin Metal Corporation.

60% of Wheeling's retail sales of electricity. Industrial Respondents, together with former respondent LCP Chemicals, constituted more than 40% of Wheeling's retail sales for the years which are the subject of the FERC case at issue herein.

Industrial Respondents pay retail rates set for Wheeling by the Public Service Commission of West Virginia ("PSCWV"). The PSCWV includes in Wheeling's rates a component, adjusted at least semi-annually, to provide for recovery of the cost of wholesale power and energy Wheeling purchases from Ohio Power. Thus, the cost of power purchased by Industrial Respondents includes the cost of Wheeling's purchases from Ohio Power, including the costs at issue in this proceeding.[2]

Of the $10.394 million Ohio Power refunded to Wheeling on May 6, 1988 covering the period from July 1982 through January 1988, approximately $4.309 million or 42 percent would be due to the Industrial Respondents and to former respondent LCP Chemicals, exclusive of additional refunds and interest accruing since that time.

STATEMENT

Industrial Respondents accept the Statement and support and adopt the Questions Presented and Reasons for Granting the Petition contained in the August 10, 1992, Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by Petitioners, Arcadia, Ohio, et al.

All applicable statutes, regulations, decisions, and authorities are contained in the aforesaid Petition for Certiorari.

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[2] Ohio Power's wholesale rates to Wheeling and to petitioners Arcadia, Ohio, *et al.* are not identical but are affected in the same manner by the issues raised in the petition for certiorari.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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September 1, 1992

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Nos. 92-264 and 92-280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners,
v.
OHIO POWER COMPANY, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
OHIO POWER COMPANY, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT OHIO POWER COMPANY IN OPPOSITION

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STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Sup. Ct. R. 28.1, Respondent Ohio Power Company presents the following list of publicly-owned parent, subsidiary and affiliated companies:

American Electric Power Company, Inc.
Appalachian Power Company
Cardinal Operating Company
Columbus Southern Power Company
Indiana Michigan Power Company
Integrated Communications Systems, Inc.
Kentucky Power Company
Ohio Valley Electric Corporation

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT OHIO POWER COMPANY IN OPPOSITION

Respondent Ohio Power Company respectfully submits this brief in opposition to the petitions of Arcadia, Ohio, *et al.* (the Municipalities), and the Federal Energy Regulatory Commission (FERC) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT

Ohio Power Company (Ohio Power) is a wholly-owned subsidiary of American Electric Power Company, Inc. (AEP), a utility holding company registered under the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. §§ 79 *et seq.* In the early 1970s, in order to ensure a reliable supply of environmentally compatible coal for the generation of electricity in the face of concerns about the security of contracted coal supplies, AEP launched a program to increase the portion of its coal supplies provided by affiliated mining companies. As part of this program, Ohio Power capitalized its subsidiary, Southern Ohio Coal Company (Southern Ohio), to develop and operate coal mines. The transaction required and received the approval of the Securities and Exchange Commission (SEC) under section 9 of the PUHCA, 15 U.S.C. § 79i. Ohio Power's contract to buy coal from Southern Ohio was subject to section 13(b) of the PUHCA, which requires that the sale be made upon the terms and conditions prescribed by the SEC "to insure that such contracts are performed economically and efficiently . . . at cost," 15 U.S.C. § 79m(b), and to the SEC's orders, which specify a cost-based price.

This case results from the refusal of the FERC to permit Ohio Power to recover in its wholesale rates the amounts it is obliged by SEC order to pay to Southern Ohio for coal burned in Ohio Power's generating stations to the extent those amounts exceed a hypothetical "market price." On remand from this Court, the court of appeals held unanimously that FERC's substitution of a market price standard for the "at cost" prescription specified by the SEC pursuant to the PUHCA violates the FERC's own regulation and impermissibly "traps" costs regulated by the SEC.

This case does not present an issue worthy of further review. The court of appeals' reading of a portion of an eighteen-year old regulation that has never before been

the subject of appellate litigation, and which the agency can amend prospectively, has no broad importance. Similarly, the court's conclusion that the FERC impermissibly trapped costs that the SEC had authorized Ohio Power to incur turned on the meaning of four SEC orders, which, as the Solicitor General advised this Court when the case was last before it, "relate to a particular coal mining operation of no general legal significance." No. 89-1283, Gov't Br. at 36. Even if the court of appeals' analysis of the "cost-trapping" issue were incorrect (which, as we will show, it was not), that issue is better reviewed in a case in which the FERC's regulation does not provide an independent basis for vacating the FERC's decision and in which the SEC's pricing prescription is not set forth in orders specific to the transaction.

1. As a public utility that is part of a registered holding company system, Ohio Power is subject to regulation both by the FERC and by the SEC. Its sales of electricity at wholesale are subject to the rate jurisdiction of the FERC under the Federal Power Act (FPA), 16 U.S.C. §§ 824 *et seq.* The FPA declares that all rates for the sale of electricity subject to the FERC's jurisdiction "shall be just and reasonable," 16 U.S.C. § 824d(a), and establishes mechanisms for the FERC to review rates for compliance with this mandate. See 16 U.S.C. §§ 824d, 824e.

Ohio Power's relationships with its affiliates are subject to the jurisdiction of the SEC under the PUHCA. The PUHCA was enacted as a comprehensive legislative response to the dominance of utility holding companies in the early part of this century. One of the principal concerns addressed by the legislation was the sale of goods and services by holding company subsidiaries to affiliated utility operating companies at inflated prices, which were then reflected in artificially high rates to consumers.[1]

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[1] *See* Federal Trade Commission, *Utility Corporations*, S. Doc. No. 92, Part 72-A at 467, Part 73-A at 63-64, 70, 70th Cong., 1st Sess.

Congress addressed this particular concern in two ways in the PUHCA. First, the SEC was assigned the task of determining whether a registered holding company could engage in non-utility businesses. Section 9(a)(1) of the PUHCA makes it unlawful for a registered holding company or any of its subsidiaries to "acquire, directly or indirectly, . . . any other interest in any business" without the approval of the SEC. 15 U.S.C. § 79i(a)(1). Under section 10 of the PUHCA, 15 U.S.C. § 79j, an application for such approval may be granted only if the SEC determines that it is not "detrimental to . . . the interest of investors or consumers" or "detrimental to the carrying out of the provisions of section [11 of the PUHCA]." [2]

Second, in cases in which the approval required by section 9(a)(1) has been granted, section 13(b) of the PUHCA prohibits sales transactions between affiliates within a registered holding company system except under such "terms and conditions" as the SEC "by rules and regulations or order shall prescribe . . . for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of [the purchasing companies] at cost." 15 U.S.C. § 79m(b).[3]

These provisions governed Ohio Power's purchase of coal from Southern Ohio. In 1971, Ohio Power sought

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(1935); Report of National Power Policy Committee on Public Utility Holding Companies, S. Rep. No. 621, 74th Cong., 1st Sess., 56 app. (1935).

[2] Section 11 of the PUHCA limits each registered holding company to the operation of a single integrated utility system and "such other businesses as are reasonably incidental, or economically necessary or appropriate to" its utility operation. 15 U.S.C.§ 79k(b)(1).

[3] The SEC has implemented the "at cost" standard of section 13(b) in its Rules 90 and 91, 17 C.F.R. §§ 250.90, 250.91 (1992). In Rule 92, the SEC has provided an alternative market-based standard for "goods produced by the seller." 17 C.F.R. § 250.92 (1992).

and obtained the approval of the SEC, under, *inter alia*, sections 9 and 10 of the PUHCA, to capitalize Southern Ohio to develop and operate coal mines. In granting the application, the SEC specified that, "[t]he charges for coal by Southern Ohio will be based on an amount equal to the actual cost of Southern Ohio in developing the reserve and mining such coal." *Ohio Power Co.*, Holding Company Act Release No. 17383 at 2 (Dec. 2, 1971). The SEC also stated that coal mined by Southern Ohio would be sold only to "public utility companies in the AEP system." *Id.* The transaction remained subject to the SEC's jurisdiction and in a series of subsequent orders, the SEC reiterated that "[t]he price at which [Southern Ohio] coal is sold to AEP system companies will not exceed the cost thereof to the seller." The calculation of the "cost . . . to the seller" was specified in some detail. The SEC also required Ohio Power and Southern Ohio to file quarterly reports detailing the quantity and price of coal sold.[4] The SEC has noted that a principal purpose of its continuing oversight is to protect consumers, explaining, in the course of approving a new financing arrangement for Southern Ohio, that a reduction in Southern Ohio's financing costs "represent[s] a reduction in the cost of coal billed to Ohio Power by [Southern Ohio] and therefore a reduction in the cost of electricity to consumers." *Ohio Power Co.*, Holding Company Act Release No. 35-24286 at 3 (Dec. 29, 1986).

2. In 1982, Ohio Power filed with the FERC to change its wholesale rates. All issues were settled except the extent to which Ohio Power could recover through its wholesale rates its costs for coal purchased from Southern Ohio.

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[4] *Ohio Power Co.*, Holding Company Act Release No. 20515, 14 SEC Docket 928, 929-30 (1978). *See also Southern Ohio Coal Co.*, Holding Company Act Release No. 21008, 17 SEC Docket 310 (1979); *Southern Ohio Coal Co.*, Holding Company Act Release No. 21537, 19 SEC Docket 1309 (1980).

The FERC's Administrative Law Judge found that, by solving operating problems previously experienced at an Ohio Power generating unit, the use of Southern Ohio coal had produced savings for electric customers, which justified paying significantly higher prices for the Southern Ohio coal. *Ohio Power Co.*, 25 FERC Rep. (CCH) ¶ 63,060 at 65,194 (1983). The Judge concluded that Ohio Power had been prudent in acquiring rights to Southern Ohio coal, that the mine had been "efficiently developed and operated," *id.* at 65,201, and that the inclusion of the price paid for the Southern Ohio coal in Ohio Power's wholesale rates was reasonable. *Id.*

Although it accepted the Judge's findings as to the prudence of Ohio Power's using Southern Ohio coal and the efficient operation of the mine, the FERC nevertheless reversed. The FERC limited Ohio Power's recovery in wholesale rates for the cost of Southern Ohio coal to a hypothetical market price, "regardless of whether the [market] price is higher or lower than costs." Pet. App. 77a.[5] *See also* Pet. App. 78a, 81a. The FERC rejected Ohio Power's contention that the agency was required, either under its own rules or under section 318 of the FPA, 16 U.S.C. § 825q,[6] to give conclusive effect to the SEC's application of a cost-based method of pricing the Southern Ohio coal. The FERC found section 318 inapplicable for two reasons. First, it concluded that its determination of the amount to be recovered in Ohio Power's wholesale rates for the Southern Ohio coal was a different "subject matter" than the SEC's specification of the price at which the coal could be sold to Ohio Power. Pet. App. 52a. Second, it concluded that its limitation of Ohio Power's recovery for that coal did not

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[5] Citations to "Pet. App." are to the appendices to the FERC's Petition.

[6] Section 318 provides that whenever a person is subject to requirements imposed under both the PUHCA and the FPA with respect to certain specified subject matters, "such person shall not be subject to the [FPA] requirement." *Id.*

conflict with the SEC's orders because those orders did not appear to the FERC "to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price." Pet. App. 51a.

3. Upon Ohio Power's petition for review, the U.S. Court of Appeals for the District of Columbia Circuit unanimously vacated the decision of the FERC. In an opinion written by Judge Sentelle and joined in by Judge Silberman, the court held that the SEC and the FERC were regulating the same subject matter and, therefore, under section 318 of the FPA, the FERC could not deny Ohio Power recovery of the price paid to Southern Ohio for coal. 16 U.S.C. § 825q. *See* Pet. App. 25a. The court rejected the FERC's argument that section 318 applied only in the case of an actual conflict between the requirements imposed by the FERC and the SEC, Pet. App. 30a, though it also found such a conflict inevitable whenever the market price allowed by the FERC exceeded the cost-based price mandated by the SEC, Pet. App. 34a. The court also held that its decision, while resting on its interpretation of the statute, was "buttressed by the consistency of its consequences with Supreme Court precedents that disfavor conflicting regulation resulting in trapped costs." Pet. App. 31a. By virtue of the statutory allocation of jurisdiction embodied in section 318, the court found the present case indistinguishable from *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). Pet. App. 33a.

The third member of the panel, Judge Mikva, agreed with the FERC that section 318 applied only in the case of actual conflict. Pet. App. 35a. He found no such conflict because he read the SEC's orders to establish "cost [only] as a ceiling," Pet. App. 38a, though he stated that he, too, would find a conflict if the market price exceeded cost. Pet. App. 39a. Although he disagreed with the ma-

jority with respect to section 318, he concurred in the judgment because of his conclusion that the FERC had violated its own regulation, 18 C.F.R. § 35.14(a)(7) (1992), under which the cost of fuel purchased from a utility's affiliate, "the price of which is subject to the jurisdiction of a regulatory body, . . . shall be deemed to be reasonable." *See* Pet. App. 39a-43a. The FERC's interpretation of this regulation as creating only a rebuttable presumption of reasonableness was, he held, entitled to no deference because it was "at odds with the plain meaning of the text." Pet. App. 40a. He also found the FERC's interpretation inconsistent with the structure and history of the regulation. Pet. App. 41a-43a.

4. The Municipalities sought review in this Court. They argued that section 318 applies only in the case of an actual conflict between the obligations imposed on a regulated entity by the FERC and the SEC, and that no such conflict exists in the present case. No. 89-1283, Pet. Br. at 13-16. In a joint submission on behalf of the FERC and the SEC, the Solicitor General also argued that section 318 applies only where the requirements of the two agencies create conflicting obligations for regulated entities. No. 89-1283, Gov't Br. at 12. The agencies urged a remand to the court of appeals to undertake the "conflicts" inquiry that they deemed required under section 318, which inquiry, they stated: "depends on the meaning of four SEC orders that have never been construed by any court and that relate to a particular coal mining operation of no general significance." *Id.* at 36.

This Court reversed the court of appeals, although it did not accept the arguments posed by Petitioners. Instead, the Court concluded that section 318 governed only four areas of potential overlap between the FPA and the PUHCA, none of which was implicated in this case. *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 419-22 (1990). The Court explained that the only arguably pertinent portion of section 318, that covering "the acquisi-

tion or disposition of any security, capital assets, facilities, or any other subject matter," 16 U.S.C. § 825q, was inapplicable because, while the SEC was regulating Ohio Power's "acquisition" of Southern Ohio or of Southern Ohio coal, the FERC was not regulating the acquisition of either such subject matter. 111 S. Ct. at 422 and n.3.

Recognizing that its "conclusion that § 318 has no application to this case [did] not end review of the FERC order," *id.*, the Court remanded to the court of appeals for consideration of arguments that the Court did not reach. First, it pointed to the ground relied upon by Judge Mikva: "the argument that FERC's decision violates its own regulation, . . . 18 C.F.R. § 35.14(a)(7)." *Id.* Second, it noted the continued availability of "the argument that the FERC-prescribed rate is not 'just and reasonable' because it 'traps' costs which the government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating [Southern Ohio]. Cf. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)." *Id.*

5. On remand, in a decision written by Judge Sentelle, the court of appeals again unanimously vacated the FERC's orders. First, the court held that the FERC's refusal to accept the cost-based pricing for Southern Ohio coal mandated by the SEC violated the plain language of the FERC's regulation. Pet. App. 7a-9a. It recognized that an agency's interpretation of its own regulations is not entitled to the usual deference "[w]hen an agency's interpretation flies in the face of the language of the rules themselves." Pet. App. 8a. The court unanimously agreed with Judge Mikva's earlier conclusion that the "unambiguous" meaning of "deemed to be reasonable" in the FERC's regulation "requires FERC to include in Ohio Power's wholesale rate the SEC-approved cost-based price for [Southern Ohio] coal," and would not support the rebuttable presumption reading urged by the FERC.

Pet. App. 8a-9a. The court also found that FERC's proposed reading was undercut by the history of the regulation. Pet. App. 9a.

Second, as an independent basis for its decision, the court held that "FERC may not set a cost-trapping rate level where that effect is occasioned by a recovery calculation inconsistent with an SEC determination governing an interassociate transfer subject to § 13(b) of the PUHCA." Pet. App. 14a. The FERC argued that the cost-trapping resulting from the combination of its order and the SEC's orders was permissible because the same subject matter was not before the two agencies and because there was no conflict between the two agencies' requirements inasmuch as the SEC's orders established cost only as a ceiling. FERC C.A.Br. at 20. The court of appeals rejected these arguments. Relying on this Court's reasoning in *Nantahala*, the court of appeals concluded that the fact that the cost-trapping resulted from the FERC's regulation of Ohio Power's wholesale electric rates, rather than from an attempt by the FERC to modify directly the price that Ohio Power paid to Southern Ohio, did not diminish or excuse the cost-trapping. Pet. App. 10a-11a. Based upon a close review of the orders of the SEC with respect to the Ohio Power-Southern Ohio transaction, the court determined that the SEC established cost as both a ceiling and a floor for Southern Ohio coal, and that the FERC's orders therefore necessarily trapped costs authorized by the SEC. Pet. App. 13a. It noted that its interpretation of the SEC's orders was echoed in an *amicus* statement submitted by the SEC. Pet. App. 13a n.3, citing SEC C.A. *Amicus* Statement at 5.[7] The court

[7] In its *Amicus* Statement (App., *infra*, 1a-5a), the SEC expressed its "disagree[ment] with the interpretation FERC places on the SEC orders in this case," and explained, "the SEC believes that the orders establish cost as both a floor and a ceiling." App., *infra*, 5a (footnote omitted). The SEC observed that unless its orders were "construed to obligate [Ohio Power] to pay a cost-based price and only a cost-based price . . . it would undermine the very reason that the SEC authorized" the transaction. App., *infra*, 4a.

held that the FERC's authority under the FPA to set "just and reasonable" rates must yield before the specific command of section 13(b) of the PUHCA that affiliate transactions within holding companies be on terms and conditions established by the SEC and the "determination" in the SEC's orders that the Southern Ohio coal must be priced "at cost." Pet. App. 14a.

REASONS FOR DENYING THE PETITIONS

Further review of the decision of the court of appeals is unwarranted. The decision below rests on two independent grounds, both of which respond directly to the questions posed on remand and involve the resolution of narrow questions that have limited application outside the facts of this case. First, the court of appeals reviewed the language of the FERC's regulation to determine if the language could bear the meaning the agency now ascribes to it. Its finding that the agency's interpretation was at odds with the plain meaning of the language led inexorably under this Court's established precedents to the conclusion that the FERC had violated its own regulation. Second, the court of appeals' independent conclusion that the FERC's orders conflicted with the regulatory prescriptions of the SEC, resulting in an impermissible trapping of costs, was based on a close analysis of the orders issued by the SEC with respect to the transaction at issue. As the Solicitor General pointed out when this matter was previously before this Court, the interpretation of those orders is without broader import. This case does not present the issue of whether the FERC may apply a market test to a transaction subject to section 13(b) in the absence of its regulation and of SEC orders specifically prescribing a cost-based price. The Court should not reach out to review an issue that may be squarely presented in another case, if the FERC decides to amend its regulation. Nor should the Court accept the FERC's entreaty to chastise the court of appeals for failing to address the cost-trapping question

through an analysis that neither Petitioner suggested to the court below.

Finally, Petitioners' claims that the decision below will open a wide "regulatory gap" are wholly unfounded. The decision does not leave the pricing of affiliate transactions within holding companies immune from *all* regulation. To the contrary, it effectuates Congress' determination that the SEC has, and must exercise, the responsibility to police such transactions to protect consumers from exploitation. The "regulatory gap" claims reflect nothing more than a distrust of the SEC's ability to fulfill the role assigned to it by Congress. If there were any basis for this distrust—and, in light of the FERC's agreement that Ohio Power was prudent in using Southern Ohio coal and that the mine was efficiently run, this case surely reflects none—then the proper forum for Petitioners' concerns would be the Congress, not this Court.

1. a. The first question posed by this Court on remand concerns whether the FERC's refusal to give effect to the SEC's specification of a cost standard for Southern Ohio's sale of coal to Ohio Power "violates its own regulation, which provides that where the price of fuel purchased from an affiliate 'is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable' in wholesale rates. 18 C.F.R. § 35.14 (a) (7)." 111 S. Ct. at 422. The court of appeals answered this question in the affirmative, approving Judge (now Chief Judge) Mikva's earlier analysis and holding that the FERC's interpretation of the regulation as creating only a rebuttable presumption of reasonableness is "not consistent with the unambiguous terms of the regulation." Pet. App. 9a.

Petitioners seek review of this holding, although they make no serious attempt to argue that it has any broad significance. In fact, prior to the decision in this case, the pertinent portion of section 35.14(a) (7) had not

required judicial interpretation since its promulgation in 1974.[8] Whether or not the court of appeals correctly read the language of the regulation, its holding plainly presents no issue warranting review in this Court. Moreover, as the court noted, Pet. App. 9a, the FERC is free to amend its regulation to conform with the meaning that it mistakenly thought was conveyed by the present language. Because the decision below can rest on this independent ground, the Petitions should be denied.

Petitioners contend that the case should nevertheless be reviewed because the holding below on the "cost-trapping" issue, discussed *infra*, precludes the FERC from applying its market test to transactions subject to the SEC's cost-based pricing even if the FERC amends the regulation. FERC Pet. at 14; Municipalities Pet. at 24. Petitioners have it backwards. This Court does not review lower courts' decisions on issues that are not necessary to support a judgment below merely for the convenience of the parties.[9] As long as the FERC's own regulation precludes the FERC from applying its market test to transactions like the one at issue here, the cost-trapping issue may never arise again. It is therefore incumbent on the FERC, if it wishes to bring the cost-trapping issue before the Court, to clear away the impediment posed by its own regulation to its application of a market test to transactions for which the SEC has specified a cost standard.[10]

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[8] In *Public Service Co. of New Mexico v. FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981), the court addressed the application of the fourth sentence of section 35.14(a)(7) (concerning the filing of unregulated affiliate fuel contracts), which is not at issue here.

[9] *See Belcher v. Stengel*, 429 U.S. 118 (1976) (petition dismissed where issue presented is not determinative); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (The Court "decides questions of public importance, . . . [but only] in the context of meaningful litigation.").

[10] It is by no means a foregone conclusion that the FERC would in fact amend its regulation. Indeed, the FERC and its predecessor

b. Moreover, the holding below is correct on the merits. The court of appeals applied the precise framework laid down by this Court for the review of an agency's interpretation of its own regulations. The court noted that an agency's interpretation is not entitled to the usual deference when it is "at odds with the plain meaning of the text." [11] It rejected the FERC's interpretation precisely because the plain meaning of the language employed in the regulation could not support the meaning that the agency now would give it.

Petitioners' primary attack on the holding below is their assertion that, because the court of appeals stated that "courts construing the word 'deemed' have *generally* found that it establishes a conclusive presumption" (Pet. App. 8a, quoting Pet. App. 40a, emphasis added), the existence of a few contrary authorities establishes sufficient ambiguity to require judicial deference to the agency's interpretation. FERC Pet. at 23; Municipalities Pet. at 21.[12] This argument is flawed in at least two critical respects.

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have twice backed away from issuing a regulation that would have accomplished the result the agency now seeks to achieve by interpretation. *See* 50 Fed. Reg. 24,779 (1985); 44 Fed. Reg. 28,683 (1979); 39 Fed. Reg. 28,911 (1974); 38 Fed. Reg. 17,253 (1973). The court below found that this history undercut the FERC's "rebuttable presumption" interpretation of the regulation. Pet. App. 9a, 41a-42a. After considering comments in a rulemaking proceeding, the agency may again decide to leave the current regulation in place, or to modify it in a way that presents entirely different issues.

[11] Pet. App. 8a, quoting Pet. App. 40a. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (agency interpretation given deference unless "plainly erroneous or inconsistent with the regulation"). Cf. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) ("[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself.").

[12] Petitioners also argue that reading "shall be deemed" in the first sentence of section 35.14(a)(7) in accordance with the usual meaning of the language employed is inconsistent with the FERC's

First, though Petitioners cite a handful of cases to support their contention that "deemed" may be read to create a rebuttable presumption, many of these citations are inapposite.[13] The weight of authority is accurately described in one of the cases cited by the court of appeals, which found an "*almost unanimous* judicial determination that the word [deemed], when employed in statutory law, creates a conclusive presumption." [14]

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implementation of its general authority over utilities' fuel costs, as set out in the balance of the regulation. FERC Pet. at 24; Municipalities Pet. at 22. This argument was succinctly addressed in Judge Mikva's original concurring opinion, where he found that the FERC's policy decision, expressed in section 35.14(a)(7), to "abide by the determination" of another agency that has passed on the price paid in an affiliate fuel transaction is "entirely consistent with the purpose of . . . avoid[ing] unreasonable fuel costs between affiliated companies, for if another agency (e.g., the SEC) has already made that determination, then there is no reason for FERC to second-guess that decision." Pet. App. 43a. The last sentence of the regulation, which states that fuel charges by affiliated companies "which do not appear to be reasonable" may be subject to suspension or investigation, is not to the contrary, since this sentence applies only to affiliate fuel purchases that are not subject to price regulation by another agency.

[13] In two of the cases cited by Municipalities, *Lavine v. Milne*, 424 U.S. 577, 583 (1976), and *Hardy v. Lomenzo*, 349 F. Supp. 617, 621 (S.D.N.Y. 1972), the statutes involved provided expressly for the admission of evidence on the point ultimately at issue. Similarly, in *Miller v. Commonwealth*, 2 S.E.2d 343, 436 (Va. 1939), the court relied on the fact that a prior version of the statute had contained the phrase "*prima facie*" before the word "deemed," and concluded that the deletion of this phrase was not intended to change the statute's meaning. Petitioner FERC also cites a dissenting opinion in a Fifth Circuit case, *Bowers v. United States*, 226 F.2d 424, 431-33 (5th Cir. 1955). Not only was this reading unpersuasive to the majority, see 226 F.2d at 429, it was based on the dissenting judge's concern (shared by the Virginia court in *Miller v. Commonwealth*) that construing the statute to create a conclusive presumption would create constitutional difficulties. *Id.* at 436. No such claim is presented here.

[14] *H.P. Coffee Co. v. Reconstruction Finance Corp.*, 215 F.2d 818, 822 (Emer. Ct. App. 1954) (emphasis added). See also *Forrester v.*

Moreover, the import of Petitioners' argument is that if an agency can point even to a single instance in which a court construed a word differently than did every other, then that word is "ambiguous" when used by the agency, rendering the agency's application of the regulation effectively immune from judicial review. Since it will be rare for any word to receive an absolutely uniform judicial interpretation, no matter the context in which it is used, this novel rule would virtually eliminate agencies' accountability in the implementation of regulations. Nothing in logic or in this Court's precedents supports such a curious result.[15]

2. a. The second issue remanded by this Court concerns whether the FERC's order impermissibly traps costs incurred in a transaction as to which the SEC had fixed the pricing standard. 111 S. Ct. at 422. Whether or not the court of appeals' affirmative answer to this question, which was based on an analysis of the orders issued by the SEC with respect to this specific transaction, was correct—and we will explain, *infra*, that it was—this issue does not merit review in this Court.

Petitioners portray the decision below as laying down a broad rule of law that the FERC is precluded from applying its market test to *any* transaction that is subject to the "at cost" requirement of section 13(b) of the PUHCA, if the effect of applying the test would be to trap costs incurred in that transaction. FERC Pet. at 21, 25; Municipalities Pet. at 12. In fact, while the court of

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Jerman, 90 F.2d 412, 413 (D.C. Cir. 1937) (the word "deemed" is "unambiguous and leaves nothing for interpretation").

[15] *See Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992) (the word "transfer" in section of Bankruptcy Code not ambiguous, even though courts of appeal had split on interpretation); *Public Employees Retirement System v. Betts*, 492 U.S. at 168 (term in a statute must be "given its ordinary meaning" by implementing agency).

appeals began its analysis with section 13(b), it did not rest on the statute, or even on the SEC's regulations implementing it. It reviewed the orders issued by the SEC with respect to this transaction to determine whether the SEC had specifically prescribed a cost-based price for Southern Ohio coal. Its finding that these orders "are better read as requiring Ohio Power to pay a price 'equal to cost' for SOCCO coal," Pet. App. 13a, is consistent with the SEC's own reading of the orders (App., *infra*, 2a, 4a), and is not challenged in either Petition.

The court of appeals' finding that the SEC orders prescribed a cost-based price was a predicate to its conclusion that the FERC's order resulted in impermissible cost-trapping.[16] This is clear from the court's ultimate holding that the FERC "may not set a cost-trapping rate level where that effect is . . . inconsistent with *an SEC determination* governing an inter-associate transfer subject to § 13(b) of the PUHCA." Pet. App. 14a (emphasis added).

The decision below thus turned on what the FERC and the SEC have jointly described as "the meaning of four SEC orders . . . that relate to a particular coal mining operation of no general legal significance." No. 89-1283, Gov't Br. at 36. Such a decision does not warrant review in this Court, especially when the lower court's interpretation of the SEC's orders agrees with that advanced by the SEC itself. This case simply does not present the broader issue as to which Petitioners seek review, *i.e.*, whether, in the *absence* of SEC orders specifically prescribing a cost-based price, the FERC may issue a rate

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[16] As discussed, *infra*, the FERC contended below that the prohibition against cost-trapping could not apply because the SEC orders established only a cost-based cap on the price of coal, precluding any conflict between the two agencies' pricing standards. Pet. App. 11a; FERC C.A. Br. at 20. The court rejected this contention because it determined that the FERC's premise was faulty.

order that has the effect of trapping costs incurred in a transaction subject to section 13(b) of the PUHCA.[17]

b. Petitioners' claim that the court of appeals' holding on the cost-trapping issue exceeded the scope of this Court's remand is based on a distorted reading of the opinions both of this Court and of the court below. Petitioners first maintain that the manner in which the Court phrased the cost-trapping issue obliged the court of appeals to weigh the extent to which the SEC's orders gave Ohio Power a "justifiable reliance interest" that it would be permitted "to recoup its investment" in Southern Ohio, and to decide whether that interest was abrogated by the FERC's orders. FERC Pet. at 15.

As an initial matter, we note that the FERC did not suggest to the court of appeals the analysis that it now asserts was mandated by this Court's remand. The teaching that the FERC urged the lower court to draw from the language of the Court's remand was that the meaning of the SEC's orders remained critical to the cost-trapping issue because, if those orders established only a ceiling price, "Ohio Power could not possibly have reasonably relied on the SEC's orders as guaranteeing recovery . . . of its cost of purchasing . . . coal from [Southern Ohio]." FERC C.A. Br. at 21. *See also id.* at 26. After the court of appeals addressed *precisely* this question, see *supra*, the FERC now argues that the lower court misinterpreted the instructions on remand. This Court should be loathe

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[17] This issue may well be presented in another case, inasmuch as section 13(b) of the PUHCA and the implementing regulations do not require the SEC to prescribe by order the specific pricing mechanism applicable to each affiliate transaction. The fact remains, however, that the SEC did so in the case of the Ohio Power-Southern Ohio transaction, in order to "exempt [Ohio Power] from the self-executing standards of the SEC rules [see n.3, *supra*] . . . and instead to establish a cost-based pricing standard" (App., *infra*, 4a) and its "determination" in this specific case was crucial to the decision below. Pet. App. 14a.

to review a court of appeals' alleged failure on remand to engage in an analysis that Petitioners did not urge on the lower court.[18]

Moreover, the FERC's attempt to convert the cost-trapping inquiry into a "takings"-style analysis is without foundation. Nothing in this Court's reference to "the argument [made by Ohio Power] that the FERC-prescribed rate . . . 'traps' costs," 111 S. Ct. at 422, suggests that the Court was doing anything more than asking the lower court to determine whether the rationale of the cost-trapping prohibition developed in *Nantahala* and *Mississippi Power & Light* applies in the circumstances of this case. In neither *Nantahala* nor *Mississippi Power & Light* did the Court consider it necessary to undertake the type of analysis now urged by the FERC, and there is no hint in this Court's remand language in *Arcadia* that the court of appeals was expected to proceed in a radically different fashion.

Petitioners also contend that the court of appeals undertook a general inquiry into whether the FERC's denial of recovery of Ohio Power's cost of purchasing coal from Southern Ohio conflicts with the SEC's regulation of this transaction. This inquiry, they claim, overstepped the bounds of the remand and revisited a question decided in the negative in this Court's earlier opinion. FERC Pet. at 21. The court of appeals, however, did not pursue conflicts in the abstract, but in the context of deter-

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[18] *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 .n.5 (1989); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Municipalities likewise did not develop before the court of appeals the argument they now make (Pet. at 17-18) that section 13(b) simply authorizes affiliate transactions that would otherwise be unlawful, but does not establish a pricing standard for those transactions. Instead, they argued that the SEC had in fact ordained a market test for sales of coal. Intervenors' C.A. Br. at 14-16. The lower court's refusal to adopt a reading of section 13(b) that was not suggested to it does not merit further review.

mining whether the FERC's orders impermissibly trapped costs that the SEC had authorized Ohio Power to incur.[19] The FERC cannot be heard to complain, having urged the court of appeals not to apply the Court's cost-trapping precedents both because different subject matters allegedly were involved and "because no conflict between the SEC's and FERC's regulatory activity has been established in this case," in that the SEC's orders set only a ceiling price for coal. FERC C.A. Br. at 20. See also Intervenors C.A. Br. at 16.

The court of appeals considered and rejected each of these arguments. It first addressed the FERC's "different subject matters" claim, finding that the FERC's regulation of Ohio Power's wholesale rates had as substantial an effect on the purchase of coal from Southern Ohio as the state's retail rate regulation had on the distinct subject matter of wholesale rates in *Nantahala*. Pet. App. 10a-11a. The court then found that the FERC's regulation had to yield so that the specific "at cost" mandate of section 13(b) and the SEC's orders applicable to this transaction would be given meaningful effect. Pet. App. 11a-13a. See n.19, *supra*. Finally, as discussed *supra*, the court found that the FERC had misinterpreted the

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[19] The cost-trapping prohibition enunciated in *Nantahala* is grounded in the recognition that a state rate order that traps costs approved by the FERC can result in "impermissible interference . . . with the scheme of federal regulation," 476 U.S. at 970, which would create a conflict insofar as the state regulation "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *California v. FERC*, 495 U.S. 490, 506 (1990), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). *See also Nantahala*, 476 U.S. at 964 (filed rate doctrine, which underlies cost-trapping prohibition, is itself based on the invalidity of state regulation that conflicts with federal authority). The court of appeals was thus entirely correct in recognizing that a cost-trapping inquiry necessarily involves a determination of whether two regulatory schemes conflict, *i.e.*, whether, by trapping costs, the FERC's orders frustrate the SEC's implementation of the regulatory regime established in the PUHCA.

SEC's orders and regulations, which prescribed cost as both a ceiling and a floor. On this basis, the court concluded that the "FERC may not set a cost-trapping rate level . . . inconsistent with an SEC determination governing an inter-associate transfer." Pet. App. 14a. This holding responds directly to the question posed on remand, as the FERC itself interpreted that question for the court of appeals.

Nor was the existence of a conflict, in the cost-trapping sense, decided by this Court in its earlier opinion. Indeed, the Court explicitly stated that it was not reaching the question of whether, "if an actual conflict is prerequisite [to the FERC yielding to the SEC], . . . it exists here." 111 S. Ct. at 418. The Court addressed a different question: whether the two agencies had imposed a requirement "with respect to . . . the acquisition or disposition of . . . any . . . subject matter." *Id.* at 422, quoting 16 U.S.C. § 825q. Its conclusion that the two affiliates were not both acquiring or disposing of the same commodity can hardly be read to have foreclosed a determination by the court of appeals that, in the circumstances of this case, a FERC order trapping costs authorized by the SEC would impermissibly frustrate the SEC's regulation of this affiliate transaction. Had the Court meant to foreclose such a finding, which the FERC conceded to be central to the cost-trapping issue, it surely would not have specifically identified this argument as available on remand.[20]

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[20] Similarly, a remand would have been pointless if there were any basis for the Municipalities' contention (Pet. at 16-17) that this Court's delineation of the scope of section 318 was equivalent to a holding that, in all matters falling outside that provision, the FERC is free to ignore conflicts with the SEC's regulatory prescriptions. This argument also ignores section 21 of the PUHCA, which provides that "nothing in [the PUHCA] shall affect . . . the jurisdiction of any other commission . . . of the United States . . . over any person, security or contract, insofar as such jurisdiction does not conflict with any provision of [the PUHCA] or any rule, regulation, or order thereunder." 15 U.S.C. § 79u.

3. Petitioners claim that the decision below, if not reviewed, will open a broad regulatory gap, leaving millions of consumers unprotected against the risk of paying inflated utility rates due to excessive payments for goods or services procured from affiliates.[21] Even if the decision below were not based on the SEC orders specific to this transaction, this claim would fail. The court of appeals' decision does not immunize the pricing of affiliate transactions within holding companies from all regulatory oversight. Rather, it permits the SEC to exercise the authority given it by Congress to determine when holding companies may enter into non-utility businesses and to regulate such transactions "as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently . . . at cost." 15 U.S.C. 79m(b). The "gap" of which Petitioners complain in fact is completely filled by the SEC.[22]

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[21] Municipalities Pet. at 11-15, 18; FERC Pet. at 18. Petitioners' claims are premised in part on their belief that the court of appeals' decision would bar state utility commissions, as well as the FERC, from trapping costs regulated by the SEC. FERC Pet. at 26. The possibility, however, that the court's reasoning could be extended to instances of cost-trapping by a state commission does not support review of the decision below. There is nothing novel about the proposition that a state utility commission may not exercise its "undoubted jurisdiction over retail sales" in a manner that interferes with a federal agency's execution of the responsibilities assigned to it by Congress. *See Nantahala*, 476 U.S. at 970. Nor is it surprising that state commissions and state consumer advocates oppose application of this settled principle. Petitioners' claims, moreover, ignore the extent to which the decision below rests on the court's interpretation of the orders issued by the SEC with respect to this particular transaction.

[22] The FERC's discussion of the "*Attleboro* gap" (Pet. at 18) therefore misses the mark. The decision in *Public Utility Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), prohibited states from regulating interstate wholesale sales of electricity when there was no federal agency empowered to do so, creating a regulatory void. Here, to the limited extent the FERC is required by the decision below to stand aside, the SEC is in a position to protect consumers.

Nor is the FERC's role completely circumscribed. The FERC retains the authority to determine how costs incurred in affiliate transactions for which the SEC has prescribed a price under its PUHCA authority are to be reflected in a utility's wholesale rates and to ensure that the utility collects no more than the SEC-authorized price. It may also advise the SEC of its views as to whether a particular affiliate transaction should go forward or whether a transaction should be exempted from the "at cost" standard of section 13(b). *See* Pet. App. 14a, n.3, *supra*. Moreover, the FERC could also urge the SEC to exercise its continuing jurisdiction over affiliate transactions in a manner consistent with the interests of investors and consumers. *See* App., *infra*, 5a n.9.

In this case, the SEC exercised the authority assigned to it by Congress by approving the initiation of Southern Ohio's coal mining activities, specifically prescribing a cost-based price, and requiring regular reporting of the quantity and price of the coal sold to Ohio Power. Nothing in the record suggests that the SEC's regulation has been ineffective. To the contrary, the FERC affirmed and adopted the findings of its Administrative Law Judge that Ohio Power acted prudently in using coal from Southern Ohio and that Southern Ohio efficiently operated the mine supplying the coal in question.[23]

Municipalities nevertheless complain that the SEC is ill-equipped to discharge the responsibility assigned to it in PUHCA. Pet. at 13. This assertion rests on an in-

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[23] 25 FERC Rep. (CCH) at 65,201; Pet. App. 80a. Accordingly, while the question of whether the FERC may deny recovery of costs that result from inefficient operation of an affiliate venture without treading upon the SEC's mandate to ensure that affiliate transactions are performed "economically and efficiently," 15 U.S.C. § 79m(b), might be of some interest, this question is simply not presented in this case. There is no basis whatsoever for Municipalities' assertion (Pet. at 12-13) that the decision below leaves no federal agency in a position to police the "gold-plating" of affiliate transactions.

complete understanding of the SEC's authority.[24] More fundamentally, however, even if Petitioners were correct that Congress gave the SEC the responsibility for policing affiliate transactions, but neglected to include all the tools necessary to do the job effectively, that is not a situation that this Court could remedy. Their petitions are more appropriately addressed to Congress. *See Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986).

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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[24] Municipalities contend, for example, that the SEC is powerless to investigate complaints regarding affiliate transactions. Pet. at 13. This ignores section 18(b) of PUHCA, which authorizes the SEC, on its own motion or at the request of a State commission, to investigate "the business . . . or practices of any registered holding company or subsidiary company thereof or facts, conditions, practices, or matters affecting the relations between any such company and any other company or companies in the same holding-company system." 15 U.S.C. § 79r(b).

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1293

OHIO POWER COMPANY,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

INTRODUCTION

The Supreme Court remanded this case to this Court to decide whether the order on review, issued by the Federal Energy Regulatory Commission ("FERC"), traps costs "disregarding a governmental assurance, possibly implicit" in certain orders of the Securities and Exchange Commission ("SEC") that Ohio Power Company would be permitted to recoup the cost of acquiring and operating a captive coal operation. 111 S.Ct. at 422. The answer to that question may involve the interpretation of the SEC orders, which were issued under the Public Utility Holding Company Act of 1935. The parties have advanced differing interpretations of those orders. Accordingly, to aid this Court in construing the relevant

orders, the Securities and Exchange Commission submits this statement as amicus curiae setting forth its interpretation of its orders.[1]

DISCUSSION

In a series of four orders beginning in 1971 and ending in 1980, the SEC authorized Ohio Power Company ("OPCO") to establish and finance Southern Ohio Coal Company ("SOCCO"). In its 1971 order, the SEC stated that the price of SOCCO coal sold to affiliates would "be based on an amount equal to the actual cost of [SOCCO] in developing the reserve and mining such coal" including overheads, interest charges and a reasonable rate of return on OPO's investment in SOCCO.[2] In the later orders, the SEC stated that the price of the coal would "not exceed cost."[3]

In the SEC's view, the 1971 order on its face requires OPCO to pay cost (as defined in the order) for the SOCCO coal, not cost or market, whichever is less. Although the latter three orders are somewhat ambiguous, the SEC believes that they too should be read, in light of their context and the policies underlying the orders, to require OPCO to pay a cost-based price for the coal, no more and no less.

In the 1970's, a number of electric utilities began to rely more heavily on coal to meet their fuel needs. At the same time, however, a number of factors operated to produce unstable coal supplies and higher coal prices.

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[1] This statement addresses only the meaning of the SEC's orders and does not take a position as to what effect, if any, the SEC's interpretation should have on the resolution of the case.

[2] *Ohio Power Co.*, Holding Company Act Release ("HCAR") No. 17383 (December 2, 1971).

[3] *Southern Ohio Coal Co.*, HCAR No. 20515, 14 SEC Dkt. 928 (April 24, 1978); *Southern Ohio Coal Co.*, HCAR No. 21008, 17 SEC Dkt. 310 (April 17, 1979); *Southern Ohio Coal Co.*, HCAR No. 21537, 19 SEC Dkt. 1309 (April 25, 1980).

Although the use of long-term supply contracts with independent coal producers tended to eliminate the need to search repeatedly for new coal supplies and to negotiate prices, the use of long-term contracts also produced problems for utilities. During the tight market of 1973-74, for example, some coal operators reneged on long-term coal supply contracts, leaving utilities to seek expensive alternative sources of supply in the spot market. Against this backdrop, many utilities, including OPCO, sought to acquire coal properties as a way of preventing the recurrence of these problems. Although such captive coal operations were recognized to be potentially costly and to pose high risks, such operations were thought to offer several advantages, including increased security of supply, protection against non-cost-related coal price increases, tax shelters for income earned from power generation, and leverage in negotiations with independent coal producers.

In permitting OPCO to undertake its captive coal operation, the SEC recognized, consistent with its statutory mandate, that such an operation was reasonably incidental, or economically necessary or appropriate to the operations of the public utility system and consistent with the interests of investors and consumers.[4] Thus, the SEC, in noting that OPCO's investment in SOCCO was intended "to assure a reliable supply of coal" for OPCO's generating facilities,[5] made the judgment that any dangers inherent in the arrangement were outweighed by the prospect of improved dependability of supply and potential economies of operation.

At the same time, the SEC recognized that undertaking a captive coal operation can involve a significant capital outlay and that the feasibility of a start-up operation can be dependent upon a consistent pricing stand-

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[4] *See* Sections 9, 10 and 11 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79i, 79j, and 79k.

[5] *See, e.g.*, HCAR No. 17383; HCAR No. 20515.

ard. While SEC rules governing the prices paid by an affiliated company for seller-produced goods (such as the SOCCO coal) can be read to mandate a lower-of-cost-or-market standard,[6] the SEC staff has long recognized that this standard would have the effect of prohibiting captive coal operations by making such investments improvident on their face.[7] This would certainly have been true with respect to the inactive mines OPCO sought to operate.

Accordingly, the four SEC orders should be construed to exempt OPCO from the self-executing standards of the SEC rules governing seller-produced goods and instead to establish a cost-based pricing standard consistent with the provisions of Section 13(b) of the Public Utility Holding Company Act, 15 U.S.C. 79m(b). The orders should be construed to obligate OPCO to pay a cost-based price and only a cost-based price since, were OPCO to do otherwise, it would undermine the very reason that the SEC authorized the acquisition of SOCCO—that is, to ensure a stable and secure supply of coal—and would be detrimental to the interests of holding company shareholders by rendering the return on OPCO's investment in SOCCO uncertain at best.[8]

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[6] *See* SEC Rules 90(d)(2) and 92(b), 17 C.F.R. 250.90(d)(2), and 250.92(b).

[7] October 27, 1978 Comments of the Division of Corporate Regulation of the Securities and Exchange Commission on the Federal Energy Regulatory Commission Staff Preliminary Report of Investigation in FERC Docket No. E-9206 at 18 n.15.

[8] In this regard, the SEC disagrees with the argument on pages 16-17 of the intervenors' brief that the SEC could "set forth or approve any sort of section 13(b) strict cost flow through requirement" only by making a finding, as required under Rule 88(b) of the SEC rules and pursuant to a declaration filed on Form U-13-1, that SOCCO was so organized and conducted or to be conducted, as to meet the requirements of Section 13(b). Rule 88(b), 17 C.F.R. 250.88(b), however, concerns subsidiary companies that, under Rule 87(a)(2), 17 C.F.R. 250.87(a)(2), may engage in service, sales or construction contracts involving associate companies because they

Thus, the SEC disagrees with the interpretation FERC places on the SEC orders in this case. The SEC does not agree that its orders "only purport to establish a ceiling for the price SOCCO can charge Ohio Power" (Br. 15; *see also* Br. 21, 27) or that its orders are not "directive[s] * * * to conform to a specific price" (Br. 26) or that "[n]othing in the express terms of the orders could * * * have reasonably led Ohio Power to conclude that it could not pay less for coal than SOCCO's cost * * *" (Br. 27). Instead, the SEC believes that the orders establish cost as both a floor and a ceiling.[9]

CONCLUSION

For the foregoing reasons, the SEC views its orders as obligating OPCO to pay cost for the SOCCO coal.

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have been found to satisfy the requirements of Section 13(b). The SOCCO coal transaction need not involve such a finding, since under Rule 87(b)(6), 17 C.F.R. 250.87(b)(6), any subsidiary, whether or not it is a company specified in Rule 87(a)(2), can engage in a transaction involving a sale of goods produced by the seller. Accordingly, the requirements of Rule 88(b) are irrelevant here.

[9] Of course, orders such as these can be modified or rescinded by the SEC if circumstances warrant.

Nos. 92-264 and 92-280

In The Supreme Court of the United States

October Term, 1992

Arcadia, Ohio, *et al.*,

Petitioners,

v.

Ohio Power Company, *et al.*,

Respondents.

Federal Energy Regulatory Commission,

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Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A JOINT BRIEF AS AMICI CURIAE AND JOINT BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE OHIO OFFICE OF CONSUMERS' COUNSEL, ELECTRICITY CONSUMERS RESOURCE COUNCIL, INDUSTRIAL ENERGY CONSUMERS, AND INDUSTRIAL ENERGY USERS-OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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September 11, 1992

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Nos. 92-264 and 92-280

In The Supreme Court of the United States

October Term, 1992

Arcadia, Ohio, *et al.*,

Petitioners,

v.

Ohio Power Company, *et al.*,

Respondents.

Federal Energy Regulatory Commission,

Petitioner,

v.

Ohio Power Company, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A JOINT BRIEF AS AMICI CURIAE OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE OHIO OFFICE OF CONSUMERS' COUNSEL, ELECTRICITY CONSUMERS RESOURCE COUNCIL, INDUSTRIAL ENERGY CONSUMERS, AND INDUSTRIAL ENERGY USERS-OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The National Association of State Utility Consumer Advocates (NASUCA), the Ohio Office of Consumers' Counsel (OCC), the Electricity Consumers Resource Council (ELCON), the Industrial Energy Consumers (IEC) and the Industrial Energy Users-Ohio (IEU-OH), hereby request, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying joint brief as amici curiae in support of petitioners. NASUCA, OCC, ELCON, IEC and IEU-OH obtained consent of the petitioners of the filing of

this brief.[1] However, respondents' consent was limited to NASUCA, OCC and ELCON. Accordingly, this motion is being submitted so that IEC and IEU-OH can be included as amici curiae for purposes of this proceeding.

NASUCA members are the state-designated representatives of the interests of utility consumers in proceedings before state and federal utility commissions and courts. More particularly, NASUCA members represent millions of retail electricity consumers in 38 states and the District of Columbia.

Since its founding in 1979, NASUCA has served as a national voice for the investor-owned utility consumers who are represented by NASUCA's individual state members. NASUCA and its members have participated in major proceedings before state and federal regulatory agencies; testified on numerous occasions before state legislatures and the Congress; and submitted briefs in cases such as this one which have important impacts on consumers throughout the Nation.

The goal of NASUCA members in all proceedings is to insure that all ratepayers - particularly the captive customers of regulated monopoly utilities - receive safe and adequate service at just and reasonable rates.

OCC was established in the fall of 1976 by the 111th Ohio General Assembly, to represent the residential utility consumers of Ohio's investor-owned electric, natural gas, telephone and water companies. Ch. 4911, Page's Ohio Rev. Code. OCC represents the interests of approximately 4 million Ohio residential utility consumer households in various proceedings concerning water, gas, telephone and electric utilities, including rate cases, fuel adjustment cases and other proceedings before the Public Utilities Commission of Ohio (PUCO), the Federal regulatory commissions, and in the Federal and state courts. OCC also has presented testimony before state and Federal legislators and participated in

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1 Letters of consent from petitioners have been filed with the Clerk by separate letter. Respondents have consented to submission of a brief by ELCON, OCC and NASUCA. Respondent's consent letters with regard to ELCON, OCC and NASUCA have also been submitted to the Clerk.

many administration initiatives (such as the U.S. Secretary of Energy's Advisory Board relative to the National Energy Strategy), and similar initiatives to review legislation and rules affecting utility regulation in Ohio.

ELCON is an association of industrial energy users organized to promote the development and adoption of coordinated and rational federal and state policies that will assure an adequate, reliable and efficient electricity supply for all users based on the costs incurred in providing such service.[2] ELCON member companies own and operate manufacturing and other facilities throughout the United States (including within the territory served by Ohio Power Company) and in many foreign countries. ELCON's 21 member companies consume more than 4% of all electricity in the United States. ELCON has a longstanding interest in matters related to the price and availability of public utility service and certain ELCON members have actively sought relief from the high cost of Ohio Power Company's (OPCo) affiliate coal in proceedings before the PUCO.

IEC is an ad hoc association of large industrial customers[3] of OPCo or other operating companies within the system of the American Electric Power Company (AEP). IEC has actively participated in various state proceedings concerning the price and availability of electricity purchased at retail by its members from AEP operating companies. IEC's members purchase about 15% of the electricity sold by OPCo.

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2 ELCON's members are Air Products and Chemicals, Inc., Airco Industrial Gases, Inc., American National Can Corporation, Amoco Corp., Anheuser-Busch Companies, Inc., Armco Inc., Bethlehem Steel Corporation, Central Soya Company, Inc., Cone Mills Corporation, Dow Chemical, U.S.A., Eastman Chemical Company, E.I. du Pont de Nemours & Co., FMC Corporation, General Motors Corporation, Hoechst Celanese Corporation, LTV Steel Company, Owens-Corning Fiberglas, Praxair, Inc. (formerly Union Carbide Industrial Gases), Republic Engineered Steels, Inc., A.E. Staley Manufacturing Company and The Timken Company.

3 IEC's members are Anheuser-Busch Co., Inc., Aristech Chemical Corp., Armco Advanced Materials, BP Oil Company, General Motors Corporation, LTV Steel Company, Owens-Corning Fiberglas, Owens-Illinois, Inc., Republic Engineered Steels, Inc., Stone Container Corporation and The Timken Company.

IEU-OH is an Ohio association of large industrial retail customers[4] of Ohio electric and natural gas utilities. It seeks to promote rational and consistent energy policies and practices in Ohio, including policies and practices related to the ratemaking treatment of transactions between affiliated firms. IEU-OH's members spend about $300,000,000 per year to obtain electricity and natural gas supplied in Ohio.

IEC's members and many members of IEU-OH have actively participated in PUCO proceedings in which they have sought relief from the high cost of OPCo's affiliate coal.

NASUCA, OCC, ELCON, IEC and IEU-OH and their respective members are active participants before state and federal regulatory agencies and seek to protect the interests of ultimate or retail electricity consumers. While these organizations do not always agree, their representation of retail consumers brings them before this Court with a common objective. As captive utility customers or the designated representatives of such customers, the members of each of these organizations have suffered from abusive transfer pricing of affiliated firms subject to PUHCA. NASUCA, OCC, ELCON, IEC and IEU-OH offer the perspective of ultimate consumers damaged by excessive utility charges that result from utility purchase decisions driven by corporate affiliation rather than the quality and cost of the goods or services.

The cost of fuel, such as coal, used to generate electricity is one of the largest categories of costs incurred to generate, transmit and distribute electricity. Large industrial customers are particularly sensitive to electric utilities' fuel costs. For example, about 50% of the price of electricity purchased from OPCo by members of IEC results from the price OPCo pays for fuel (primarily coal) used to generate electricity. A change in the price of electricity of no more than one-tenth of one cent ($.001) can change a large industrial's annual electricity bill by over $1,000,000.

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4 IEU-OH's members are Airco Industrial Gases, Anheuser-Busch Co., Inc., Aristech Chemical Corp., Armco Advanced Materials, BP Oil Company, Libbey-Owens Ford Co., Owens-Corning Fiberglas, Owens-Illinois, Inc., Praxair, Inc. (formerly Union Carbide Industrial Gases, Inc.), Republic Engineered Steels, Inc., Stone Container Corporation and The Timken Company.

Due to their experience and interest in regulatory proceedings, NASUCA, OCC, ELCON, IEC and IEU-OH provide a unique perspective for this Court's consideration. These organizations have combined in the hope that their common perspective on issues presented by petitioners will assist the Court in evaluating the decision of the United States Court of Appeals for the District of Columbia.

For the foregoing reasons, NASUCA, OCC, ELCON, IEC and IEU-OH respectfully request Leave to File the attached Joint Brief as Amici Curiae in Support of Petitioners.

Respectfully submitted,

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE OHIO OFFICE OF CONSUMERS' COUNSEL, ELECTRICITY CONSUMERS RESOURCE COUNCIL, INDUSTRIAL ENERGY CONSUMERS, AND INDUSTRIAL ENERGY USERS-OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

NASUCA, ELCON, OCC, IEC and IEU-OH adopt the questions presented to this Court as contained in the Petitions for Certiorari.

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JOINT BRIEF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE OHIO OFFICE OF CONSUMERS' COUNSEL, ELECTRICITY CONSUMERS RESOURCE COUNCIL, INDUSTRIAL ENERGY CONSUMERS, AND INDUSTRIAL ENERGY USERS-OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The National Association of State Utility Consumer Advocates (NASUCA), the Ohio Office of Consumers' Counsel (OCC), the Electricity Consumers Resource Council (ELCON), the Industrial Energy Consumers (IEC) and the Industrial Energy Users-Ohio (IEU-OH), pursuant to the Rules of the Supreme Court of the United States, hereby submit this brief as amici curiae, in support of the "Petition for a Writ of Certiorari" and "Petition for a Writ of Certiorari to the United States Court of Appeals for the

District of Columbia" filed on August 10, 1992 and August 12, 1992, respectively, by petitioners (the Petitions for Certiorari).

NASUCA, OCC, ELCON, IEC and IEU-OH (Amici) adopt the citation of decisions (opinions below), statement of jurisdiction, statement of authorities involved and statement of the case set forth in the Petition for Certiorari filed by petitioner, Arcadia, Ohio, *et al.* Amici also adopt the description of the parties to the proceeding contained in the Petitions for Certiorari.

REASONS FOR GRANTING THE PETITIONS

I. SUMMARY

In the opinion below, the court of appeals, on remand from this Court, again vacated a decision of the FERC that excluded from a determination of wholesale rates a portion of the payments made by Ohio Power Company (OPCo) to its wholly-owned and affiliated coal supplier. The FERC ruled that this disallowance was necessary to determine the revenue that OPCo could lawfully collect from its wholesale customers, to establish just and reasonable wholesale rates, to promote economic efficiency as contemplated by Sections 205 and 206 of the FPA, 16 U.S.C. §§824d and 824e, and to protect against self-dealing and abusive transfer pricing practices by affiliates, all in the context of the exercise of the FERC's ratemaking authority. In vacating the FERC's decision, the court of appeals improperly applied the FERC's regulation which considers the Securities and Exchange Commission's (SEC) approval of interaffiliate sales, *see* 18 C.F.R. §35.14(a)(7), and wrongly held that the FERC was obliged to accept without question an "at cost" pricing determination that the court of appeals found in the SEC's limited pronouncements regarding OPCo's capitalization of its affiliate coal company.

Amici collectively participate in hundreds of retail ratemaking proceedings each year throughout the United States. Many of these proceedings require detailed examination of affiliate transactions by companies subject to PUHCA for purposes of determining utility revenue requirements that fairly balance the interests of ratepayers and utility owners. As suggested in the Petitions for

Certiorari, the court of appeals' decision has been, and will continue to be, cited as a ruling that bars state regulatory authorities from exercising their traditional powers to investigate and adjust prices for goods and services flowing between affiliates subject to the PUHCA. If the court of appeals' decision is permitted to stand, state regulatory authorities will be unable to adopt results that simulate the forces which competitive markets would impose upon utilities but for their monopoly status and thereby establish retail utility rates which are just and reasonable.

Amici submit that the decision of the court of appeals warrants this Court's review. First, the decision below conflicts with *Arcadia, Ohio v. Ohio Power Co.*, _____ U.S. _____, 111 S.Ct. 415, 112 L.2d 374 (1990). Second, the lower court has established a legal principle that inappropriately subordinates the FERC's ratemaking responsibilities to the SEC's authority under the PUHCA. Third, the court of appeals' unnecessarily sweeping conclusion regarding the SEC's authority to establish conclusively the prices for goods or services transferred by affiliates subject to the PUHCA will frustrate efforts to set just and reasonable retail utility rates. Congress could not have intended any of these results.

Amici will devote their efforts to urge this Court to consider the implications of the lower court's decision upon retail ratemaking in the several states.

II. THE DECISION BELOW WILL IMPEDE THE ESTABLISHMENT OF JUST AND REASONABLE RETAIL RATES

As a practical matter, the lower court's decision suggests that PUHCA inter-affiliate transactions concerning non-utility property can be structured on a cost plus basis and thereby enjoy an economic safe harbor which is unavailable to independent suppliers that must compete in the marketplace. If left undisturbed, the lower court's decision will promote affiliate relationships, inefficient or uneconomical affiliate transactions and vertical integration by utilities. This contrasts sharply with any policy objective discernable from the PUHCA and the many laws and cases that express the policy of the states. In addition, many states are implementing programs that encourage utilities to use

competitive bidding for supply and demand-side resources to evaluate utility performance. The lower court's decision suggests that distorted PUHCA structures may be used to evade efforts to promote efficiency and evaluate objectively the performance of monopoly utility suppliers.

Retail ratemaking authorities and state legislatures have enacted and applied specific rules for the examination and treatment of transactions between companies affiliated with public utilities. Through administrative case law and specific statutory commands, state regulatory authorities have examined the price of goods or services purchased by utilities from affiliate suppliers by reference to the cost of such goods and services as would have been established by arms length transactions.

Indeed several retail ratemaking authorities with jurisdiction over AEP operating companies have reviewed purchases of coal from AEP affiliate mines. For example, in 1979, the Michigan Public Service Commission (Mich. PSC) issued a retail rate order applicable to Indiana & Michigan Electric Company (I&M). In fulfilling its ratemaking responsibilities, the Mich. PSC reviewed the pricing of coal purchased from I&M's affiliated coal mine. During the proceeding, I&M urged the Mich. PSC to adopt I&M's characterization of the SEC's cost plus pricing claiming (somewhat ironically) that market-based pricing would lead to prices substantially above prices based on the SEC's cost plus standard. In other words, I&M argued that market-based pricing would ultimately lead to higher rates than the cost plus standard it favored. However, the Mich. PSC determined that a market-based price for the affiliate coal was fair and provided the appropriate incentive for efficient inter-affiliate purchase decisions.

> The Commission FINDS that the 90-day rolling average market price as proposed by the Staff is the pricing basis for Braztah coal which is most equitable to both Applicant and its ratepayers. The Braztah coal mine is a nonjurisdictional operation,[1] which means that the Braztah investment is not

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1 Affiliate investments are frequently treated as nonjurisdictional or "below-the-line" operations for ratemaking purposes.

included in Applicant's rate base and that this Commission cannot regulate directly the operations of the Braztah mine or the price of the Braztah coal. Although it has treated similar investments by other utilities on a case-by-case basis, the Commission in recent years has most often allowed for ratemaking purposes the market price of fuel sold by an affiliated company to a regulated utility. The effect on pricing affiliated fuel at market is to allocate the risk and the benefit of the nonjurisdictional investment to the utility. This allocation of risk and benefit is consistent with the allocation made in the nonregulated sector of the economy and is ordinarily assumed to be fair. The further effect of pricing affiliated fuel at market is to provide the affiliate company with an incentive to operate efficiently. This incentive is likewise consistent with that which exists in the nonregulated economic sector. Pricing affiliated fuel at cost plus, as proposed by Applicant, at least provides no incentive for efficient operation and may provide a positive incentive for inefficient operations, the total cost of which would be borne by Applicant's ratepayers.

There may be circumstances to which cost-plus treatment of sales of fuel by an affiliated enterprise to the regulated utility is justified, but the Commission finds no such justification here. The Commission is not persuaded that the coal price or supply situation was, or is, so critical as to necessarily lead Applicant to acquire its own coal supplies in order to continue to provide adequate service to its customers. There is simply no justification in this record for requiring Applicant's ratepayers to guarantee a return on the Braztah coal venture.

In Re Application of Indiana & Michigan Electric Company, Case No. U-5608 at 71; (Mich.PSC, April 10, 1979).

In Ohio, the cost of coal used to generate electricity is subject to recovery through a statutorily authorized fuel adjustment clause. Ohio Rev. Code Ann. §4905.191 (Page's 1992). However, the coal cost subject to recovery through Ohio's fuel adjustment clause in the case of coal purchased from a supplier owned in whole or part by the electric utility shall:

> ...not exceed a price that is, in the judgment of the public utilities commission, reasonable when compared to the average cost per million British thermal units of similar quality coal purchased from all independent like mining operations under similar term contracts during the same period.

Ohio Rev. Code Ann. §4905.01(F) (Page's 1992)

In a case involving another AEP operating company (Columbus Southern Power Company or CSP), the Public Utilities Commission of Ohio (PUCO) rejected OCC's argument that retail ratepayers should benefit from again realized upon sale of an affiliate coal mine. The PUCO accepted CSP's argument that ratepayers were not entitled to the gain since the affiliate mine was not utility property and its shareholders had accepted the risks associated with its operation. *In Re Columbus Southern Power Company*, Case No. 88-102-EL-EFC; 1988 Ohio PUC Lexis 995 at *33 (PUCO October 28, 1988). At the risk of highlighting the obvious, CSP's "below-the-line" treatment of gains realized from the sale of affiliate coal mines, when combined with OPCo's (a sister company) insistence on cost plus coal prices when cost plus exceeds market, creates a ratepayer trap rather than a cost trap. The "below the line" treatment of affiliate investments for ratemaking purposes and its significance relative to the allocation of risks associated with non-utility property investments between ratepayers and utility owners are factors which cause Amici to conclude that the court of appeals' concern about a potential cost trap is misplaced in this context.

The above decisions by the PUCO and the Mich. PSC and Ohio's law concerning the price of coal obtained by public utilities from affiliate suppliers, are illustrative of the regulatory framework throughout the United States. While the decision of the lower court

does not directly address the relationship between the SEC's power and the powers of state regulatory authorities, the lower court's decision sounds an alarm to those, such as Amici, charged with the responsibility of protecting the interests of ultimate consumers of utility services. Amici share petitioners' concerns about the ultimate effect of the lower court's decision upon the power of the states, as exercised in past cases and as needed in the future.

CONCLUSION

The Petitions for Certiorari should be granted.

Respectfully submitted,

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September 11, 1992

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	)	
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	)	Nos. 92-264 and 92-280
_____	)	
	)	
Federal Energy Regulatory Commission	)	
	)	
v.	)	
	)	
Ohio Power Company, *et al*	)	

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of September, 1992, three copies of the foregoing Motion and attached Joint Brief were served by ordinary mail, postage prepaid, on the following counsel:

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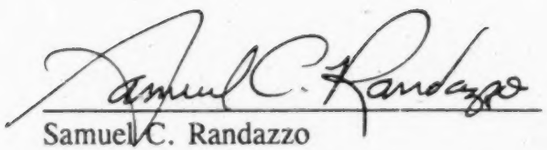

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, AS *AMICUS CURIAE* IN SUPPORT OF BOTH PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF BOTH PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit

organization founded in 1889. The NARUC represents the collective interest of the State regulatory commissions charged with regulating the rates and conditions of service of electric, natural gas and telephone utilities operating within their respective jurisdictions. The NARUC's member commissions are obligated under State law to ensure that the rates charged to retail consumers are just and reasonable. The NARUC's mission is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America.

The NARUC submits this brief as *amicus curiae* in support of the petitions for certiorari filed by Arcadia, Ohio, *et al.* and the Federal Energy Regulatory Commission (FERC) because review by this Court is essential to prevent the harm the decision below will have upon the ability of State regulatory commissions to effectively scrutinize and regulate the retail rates of electric utilities. That decision eliminates the FERC's jurisdiction to determine the justness and reasonableness of fuel charges an electric utility can include in its *wholesale* rates where the utility purchases its fuel through affiliate contracts subject to the jurisdiction of the Securities and Exchange Commission (SEC). Left unreviewed, the decision also could be used to prevent State public utility commissions from reviewing similar costs and determining the

extent to which they are properly passed through to the *retail* consumer. The resulting gap in *both* federal and State rate regulation would allow any utility owned by a registered public utility holding company to buy fuel or other goods and services from an affiliate at inflated prices and pass through its entire cost to ratepayers without any scrutiny by a ratemaking agency at either the Federal or State level.[1]

SUMMARY OF ARGUMENT[2]

Left unreviewed, the decision of the court below will have a devastating effect not only on the FERC's regulation of wholesale power sales, but also could provide a springboard for substantial preemption of State regulation of the retail rates of electric utility subsidiaries of registered holding companies. The NARUC respectfully submits that this court must grant the respective petitions for the reasons therein stated, but also to protect the integrity of State utility regulation. Unless reviewed and reversed, the lower court's

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[1] Pursuant to Rule 36 of the Rules of this Court, NARUC has obtained the consent of the parties to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

[2] The facts of this case are set forth fully in the two petitions. Accordingly, the NARUC will assume familiarity with those facts and focus on the reasons for granting the petitions.

erroneous reliance on this court's decisions finding preemption of State retail regulation of holding company affiliates carries the clear threat of federal preemption under a new guise -- the SEC's purported regulation of interaffiliate transfer prices "at cost." Because Congress did not intend such preemption of either FERC or State regulatory authority, the petitions must be granted.

ARGUMENT

THE PETITIONS MUST BE GRANTED TO PREVENT HARM TO STATE REGULATION OF ELECTRIC UTILITY RATES AND SERVICES

In *Arcadia* v. *Ohio Power Co.*, _ U.S. _, 111 S. Ct. 415 (1990) (*Arcadia I*), this Court reversed the same court of appeals' prior attempt to construe section 318 of the Federal Power Act (FPA), 16 U.S.C. § 825q, to divest the FERC of its authority to disallow the pass-through of costs from "SEC-approved" affiliated coal companies in establishing just and reasonable wholesale power rates. In its decision below, the court of appeals has reinstated its prior holding, this time invoking Section 13(b) of the Public Utility Holding Company Act (PUHCA), 15 U.S.C. § 79m(b). Section 13(b) provides for SEC jurisdiction over certain transactions among holding company affiliates, and prohibits sales of goods between affiliates unless they are "at cost." The court below held that the "at cost" standard set forth in Section 13(b) governs not

only the transfer price of goods and services among holding company affiliates, but also dictates the extent to which those costs can be passed through and recovered in rates, irrespective of whether the costs are reasonable or consistent with market prices. This holding creates a substantial risk that the authority of State public utility commissions to review those costs, which are central to retail rates, would likely be preempted under Supremacy Clause principles. Stated simply, the decision below could be read to preclude State public utility commissions from satisfying their respective statutory mandates to ensure that retail utility rates are just and reasonable.

This Court has stated that "this Court, where possible, interprets congressional enactments so as to avoid serious constitutional questions." *Cheek v. United States*, ___ U.S. ___, ___, 111 S. Ct. 604, 611 (1991). The preemption analogies used by the court below, however, unnecessarily raise important Supremacy Clause issues. In cases involving the relationship between two federal agencies, as here, the Court has limited its analysis to the applicable statutes. *Pauley v. BethEnergy Mines*, Inc., __ U.S. __, __, 111 S.Ct. 2524, 2539 (1991) ("an interpretation that harmonizes an agency's regulation with their authorizing statute is presumptively reasonable ..."). The court of appeals' decision

to rely on an unnecessary preemption analysis, to the potential detriment of the States, and to interfere with a reasonable statutory interpretation by FERC, is error.[3]

The crux of the issue is that the SEC has neither the statutory authority nor the expertise to set wholesale or retail electric rates. The SEC's authority is intended to prevent collusion and abusive self-dealing between the affiliates of utility holding companies that could occur through their contractual relationships. *See*, 15 U.S.C. §§ 79a(c), 79m(b), and 79m(c). Potential abuses of the horizontal relationship between holding company affiliates are regulated by the SEC's imposition of a ceiling on transfer prices. By contrast, the FERC's role is to ensure reasonable rates to be charged by a

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[3] Even if preemption analogies were appropriate, the decision below is seriously flawed. As the Court stated in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the authority of a federal agency such as the SEC to displace state regulatory jurisdiction must be firmly grounded in the agency's statutory authority:

> An agency may not confer upon itself [preemptive] power. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.
>
> 476 U.S. at 375.

utility subsidiary to its wholesale customers -- a vertical transaction. *Electrical District No. 1 v. FERC*, 776 F.2d 490 (D.C. Cir. 1985); *Towns of Alexandria, Minnesota v. FPC*, 555 F. 2d 1020 (D.C. Cir. 1977). In practice, the FERC reviews a utility subsidiary's management of the agreements whose establishment was approved by the SEC. The point here, however, is that it is the FERC, and not the SEC, that has ongoing jurisdiction over utility operations at wholesale under the FPA. *City of LaFayette, Louisiana v. SEC*, 454 F.2d 941 (D.C. Cir. 1971).

Equally important from the NARUC's perspective, the Court has often recognized that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states." *Arkansas Electrical Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983). Accordingly, it has sought to protect the flexibility and discretion of State (and Federal) utility regulators in exercising their judgment. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989); *Permian Basin Rate Cases*, 390 U.S. 747 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Thus, in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), this Court carefully limited

federal preemption of State public utility commission authority to cases resulting in "trapped" costs.

Nantahala and *Mississippi Power* make clear that "trapping" of costs can occur only where one governmental agency *requires* a utility to incur specific costs and a second agency sets a price that ignores the utility's obligation. *See Mississippi Power*, 487 U.S. at 354 ("it obviously cannot be unreasonable for [a utility] to procure the particular quantity of high-priced ... power that FERC has ordered it to pay for."). Thus, in *Nantahala*, the Court made clear that "a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power is obtained at a FERC-approved, and therefore reasonable *price*." 476 U.S. at 972. Here, the Ohio Power Company was not *required* by either the SEC orders at issue or Section 13(b) to purchase high-cost coal -- or any coal at all -- from Southern Ohio Coal Company (SOCCO). Thus, neither *Nantahala* nor *Mississippi Power* can be fairly read to preclude State public utility commissions or the FERC from scrutinizing the reasonableness of those costs or similar captive costs and disallowing their pass-through if warranted.

By contrast, the decision of the court below would entirely oust both State commissions *and* the FERC from

jurisdiction over *all* captive coal costs, as well as the costs of other inter-affiliate transactions. What is worse, it commands this result in response to SEC action that provides no serious scrutiny of the reasonableness of the "costs" one affiliate charges the other. Moreover, by vesting exclusive jurisdiction over inter-affiliate transactions with the SEC, the decision below threatens to eviscerate the wholesale and retail ratepayer protection currently provided by FERC and State public utility commissions. As Judge Mikva recognized in his concurrence in *Ohio Power Co. v. FERC*, 880 F. 2d 1400, 1412 (D.C. Cir. 1989), "the SEC's approval of the various transactions was grounded on the financial aspects of the corporate arrangements, not on the reasonableness of the price paid for coal."[4]

Indeed, the SEC is incapable of rate regulation.[5]

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[4] The decision below directly conflicts with this Court's holding that "Congress. . .delegated to. . .the Federal Energy Regulatory Commission **exclusive** authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to source of production." *New England Power Co. v. New Hampshire*, 455 U.S.331, 340 (1982).

[5] The SEC itself has repeatedly emphasized that it has "no power over the ... dealings [of electrical utilities regulated under PUHCA] with their customers, retail or wholesale." *American Electric Power Co.*, 46 S.E.C. 1299, 1323 (1978).

Unlike the FERC and State public utility commissions, the SEC has none of the technical expertise, authority or administrative apparatus necessary for effective rate regulation. The SEC even lacks the fundamental ratemaking power to suspend rates and order refunds. For this reason, there is absolutely no assurance, much less likelihood, that an SEC-approved cost would result in a rate that is just and reasonable.[6] Accordingly, the suggestion of the court of appeals that the ability of the FERC or, presumably, a State public utility commission, to "comment" on or to request an SEC investigation of proposed inter-affiliate transaction costs bridges the regulatory gap created by the decision below is completely fanciful. *See Ohio Power Co. v. FERC*, 954 F.2d 779, 786 (D.C. Cir. 1992). It also demeans the important functions of rate regulators.

The inevitable result of such gross lack of regulatory oversight is clear. Coal costs alone (not to mention the

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[6] The inadequacy of the SEC's "regulation" of captive coal costs in this case is evident in the court of appeals' inability to discern from the SEC orders at issue whether the SEC had established cost as both a ceiling and a floor for SOCCO's coal prices. *Ohio Power Co.*, 954 F. 2d at 785. Indeed, in issuing those orders, the SEC conducted no hearings and made no findings of fact whatsoever regarding any aspect, let alone the reasonableness, of the prices at which SOCCO would sell its coal to Ohio Power.

myriad additional costs that could and, most likely would, become the subject of inter-affiliate transactions under the decision below) comprise approximately 50 percent of the total cost of electrical generation. There can be no doubt that such costs, left only to "review" by the SEC under Section 13(b)'s "at cost" standard, would be inflated. The facts of this case show as much. In 1980 and 1981, just before the FERC adopted the "comparable market" cost test and initiated its investigation of Ohio Power's rates, the cost of coal purchased by Ohio Power from SOCCO was 50 percent and 94 percent over the comparable market price, respectively. Under the decision below, FERC and State public utility commissions will be powerless to prevent such abuses.

Similar opportunities for self-dealing, rate manipulation and rate-payer gouging by utilities subject to PUHCA abound.[7] In fact, the result of the court of appeals' decision will be to *encourage* utilities to adopt a holding company form

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[7] The potential for rate manipulation and abuse is particularly acute where a holding company-owned utility obtains SEC approval both to transfer assets previously included in its rate base to a newly created wholly-owned subsidiary and to purchase goods from that subsidiary "at cost" without further regulatory scrutiny. In this manner, a utility can simply spin-off inefficient or gold-plated operations and recover the inflated costs through SEC-insulated rates. Such disincentives to develop least-cost sources of fuel and other goods and services are intolerable.

to take advantage of such opportunities. Such a result is plainly inconsistent with Congress' express goal in enacting PUHCA of eventually eliminating public utility holding companies. 15 U.S.C. § 79a(c).

In sum, the court of appeals' decision in its entirety is fundamentally inconsistent with congressional intent and State statutory schemes. As Justice Stevens pointed out in *Arcadia I*, Congress clearly could not have intended to create the huge regulatory gap opened up by the court of appeals' decision which will enable utilities owned by holding companies to escape effective State and Federal regulation because of their corporate structure. *Arcadia I* at 423. To the contrary, in enacting PUHCA and the FPA, Congress intended utilities owned by holding companies to be regulated by both the SEC and FERC (*Id.*), as well as by State public utility commissions, to the greatest extent practical.[8] Sixty years after the passage of these acts, State public utility commissions should not be faced with the risk of preemption of a vital portion of their longstanding mandate to ensure the justness

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[8] *See* 15 U.S.C. § 79u ("Nothing in this chapter shall affect...the jurisdiction of any other commission, board, agency, or officer...of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder.")

and reasonableness of retail rates for electricity.

This Court in *Arcadia I* granted certiorari and closed the regulatory gap created by the decision below. In reinstating that gap, the court of appeals acted in direct conflict with this Court's decision and severely jeopardized effective Federal *and* State regulation of electrical utility rates. If anything, certiorari is more important now than it was three years ago. The NARUC respectfully urges this Court to review the decision below and remedy the broad jurisdictional consequences of its ruling.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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Petitioners

v.

OHIO POWER COMPANY, *et al.*,
Respondents

FEDERAL ENERGY REGULATORY COMMISSION,
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v.

OHIO POWER COMPANY, *et al.*,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE INDIANA MUNICIPAL POWER AGENCY AS *AMICUS CURIAE* IN SUPPORT OF BOTH PETITIONS

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously interpreted Section 13(b) of the Public Utility Holding Company Act (PUHCA), 15 U.S.C. § 79m(b), to divest the Federal Energy Regulatory Commission (FERC) of jurisdiction under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, to determine whether it is just and reasonable for a utility that is a subsidiary of a registered holding company to charge wholesale electric customers the entire cost of fuel purchased from an affiliate when lower-cost alternatives are available.

2. Whether the court of appeals erred by failing to defer to FERC's consistent interpretation of its regulation, 18 C.F.R. § 35.14(a)(7), and by construing that regulation to require that all payments by a utility for fuel purchased from an affiliate must be charged to ratepayers, whenever the contract between the utility and its affiliate is subject to the jurisdiction of the Securities and Exchange Commission under PUHCA Section 13(b).

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BRIEF OF THE INDIANA MUNICIPAL POWER AGENCY AS *AMICUS CURIAE* IN SUPPORT OF BOTH PETITIONS

INTEREST OF THE INDIANA MUNICIPAL POWER AGENCY

Amicus Indiana Municipal Power Agency (IMPA) is a political subdivision of the State of Indiana, pursuant to Ind. Code § 8-1-2.2, that serves as an electric power supply and planning agency for municipalities which own

and operate retail electric distribution systems.[1] IMPA currently consists of 31 Indiana cities and towns, serving approximately 250,000 people.[2] IMPA purchases wholesale electric power from Indiana Michigan Power Company (I&M), which is an operating company subsidiary of the American Electric Power Company, Inc. (AEP). AEP is a registered public utility holding company subject to the jurisdiction of the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act (PUHCA). I&M's wholesale rates to IMPA are subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d and 824e, authorize and direct FERC to ensure that wholesale electric rates are just and reasonable.

The opinion below, *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992) (hereinafter *Ohio Power II*), eliminated the authority of FERC to disallow in wholesale rates unjust and unreasonable costs of coal purchased by an operating company subsidiary of AEP, Ohio Power Company (Ohio Power), from a fuel subsidiary. The D.C. Circuit held that Section 13(b) of PUHCA, 15 U.S.C. § 79m(b), deprives FERC of jurisdiction to disallow in Ohio Power's wholesale electric rates the portion of payments to its fuel subsidiary which FERC found to be in excess of the price of comparable coal in the market. The

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[1] Consent of the parties is not required for the filing of this brief, because IMPA is a political subdivision of the State of Indiana, and is represented here by its General Counsel as well as by other counsel (Rule 37.5).

[2] The members of IMPA are the cities and towns of Advance, Anderson, Bainbridge, Bargersville, Centerville, Columbia City, Covington, Crawfordsville, Darlington, Edinburgh, Flora, Frankfort, Frankton, Greendale, Greenfield, Jamestown, Ladoga, Lawrenceburg, Lebanon, Linton, Middletown, Paoli, Pendleton, Peru, Renssalaer, Richmond, Rising Sun, Scottsburg, Tipton, Washington and Waynetown, Indiana.

lower court also held that a FERC fuel adjustment clause regulation, 18 C.F.R. § 35.14(a)(7), requires FERC to treat all of Ohio Power's coal payments to its subsidiary as conclusively just and reasonable, and, therefore, recoverable from ratepayers, because those payments are subject to the SEC's jurisdiction under Section 13(b) of PUHCA. The case was on remand from this Court. *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415 (1990). In *Arcadia*, the Court reversed a previous opinion of the D.C. Circuit, *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989) (hereinafter *Ohio Power I*). In its earlier decision, the lower court had held that Section 318 of the FPA, 16 U.S.C. § 825q, deprived FERC of jurisdiction to issue its order. IMPA participated as *amicus curiae* in this Court, supporting reversal of *Ohio Power I*.

Inter-affiliate transactions can be a sizable component of the costs of operating subsidiaries of public utility holding companies. For example, AEP, through its operating companies, has invested not only in affiliate coal mining operations, but also in related fuel supply equipment and facilities, including a fleet of river towboats and approximately 500 coal barges;[3] more than 3,000 rail-hopper cars for transporting coal; and a rail-to-barge coal transfer terminal on the Ohio River with the capacity to transfer approximately 15,000,000 tons of coal annually.[4] As a purchaser of electricity from an operating company subsidiary of a registered public utility holding company, IMPA has a direct interest in preventing the imposition of unwarranted restrictions upon FERC's ability to regulate for the protection of consumers the wholesale electric rates of such operating company subsidiaries.

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[3] *Indiana and Michigan Electric Co., et al.*, HCAR No. 24039, 35 S.E.C. Docket 207, 208 (March 4, 1986).

[4] *Indiana and Michigan Municipal Distributors Ass'n v. Indiana Michigan Power Co.*, 51 F.E.R.C. ¶ 63,019, at 65,080 (1990) (Initial Decision), *exceptions pending on other grounds.*

IMPA currently is involved in litigation before FERC regarding, *inter alia*, the reasonableness of I&M's inclusion in its wholesale electric rates of amounts associated with purchases of coal and coal transportation services from affiliates and from a non-affiliated company. In Phase II of that litigation, a FERC Administrative Law Judge (ALJ) has ruled that a portion of payments made by I&M under contracts to purchase coal should be disallowed as unreasonable. To accomplish this disallowance, the ALJ ordered I&M to reduce its rates to its wholesale electric customers by $25 million. *Indiana and Michigan Municipal Distributors Ass'n v. Indiana Michigan Power Co.*, 51 F.E.R.C. at 65,090. In addition, the ALJ found that I&M's payments to an affiliate for the capital costs of the AEP rail-to-barge coal transfer facility allocated an excessive share of the costs of that facility to I&M's ratepayers. He ordered I&M to charge its wholesale customers only for that portion of the facility that it actually uses. *Id.* at 65,098. Exceptions to the ALJ's decision are pending before FERC. Prior to this Court's decision in *Arcadia*, I&M argued that *Ohio Power I* immunized I&M's costs from the ALJ's scrutiny and order. Subsequent to the issuance of *Ohio Power II*, the Chairman of FERC stated in a letter to Congressman Sharp of Indiana:

> If the D.C. Circuit's latest opinion is left unchanged, it is conceivable that the Commission may be without jurisdiction to resolve the issues in Phase II.

App., *infra*, 3a.[5] Although IMPA does not necessarily agree that *Ohio Power II* deprives FERC of jurisdiction to affirm the ALJ's decision against I&M or to provide additional relief, IMPA has a direct interest in seeking review by this Court of the lower court's opinion.

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[5] The Appendix to this brief reproduces the April 9, 1992, letter from FERC Chairman Martin L. Allday, to the Honorable Philip R. Sharp of the House of Representatives. A copy of the letter is in the public file in FERC Docket Nos. EL88-1-000, ER88-31-000 and ER88-32-000 (Phase II) in FERC's Office of Public Information.

REASONS FOR GRANTING THE PETITIONS

1. The lower court's ruling that Section 13(b) of PUHCA limits FERC's jurisdiction to disallow in wholesale electric rates the costs of unjust and unreasonable inter-affiliate transactions violates this Court's mandate in *Arcadia*. The lower court acted beyond the scope of the remand, and its ruling is inconsistent with *Arcadia*'s holdings and reasoning. As in *Ohio Power I*, the lower court has upset half a century of decisionmaking by FERC and its predecessor, the Federal Power Commission (FPC), *and* by the SEC. Moreover, the lower court erroneously applied this Court's precedents on Federal preemption in electric ratemaking.[6]

a. In the D.C. Circuit's first opinion, a majority of a three-judge panel held that FERC was divested of jurisdiction to regulate Ohio Power's wholesale rates, insofar as they included the cost of coal purchased from its affiliate, Southern Ohio Coal Company (SOCCO), by Section 318 of the FPA. The panel majority held that Section 318 ousted FERC of jurisdiction under the FPA over any "subject matter" which was subject to SEC regulation under PUHCA. *Ohio Power I*, 880 F.2d at 1405-06, 1408. The panel majority also held that when FERC disallowed a portion of the price paid by Ohio Power to SOCCO, it was regulating the same subject matter as Section 13(b) of PUHCA: "[t]he price term of sales contracts between associated companies." *Id.* at 1406. Relying on a broad reading of Section 13(b) as delegating to the SEC the task of "regulating the terms of affiliate contracts in the interest of consumers, as well as investors and the public" (*id.*), the court concluded, analogizing to this Court's holding that state retail ratemaking agencies may not "trap" costs of wholesale transactions subject to FERC's juris-

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[6] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

diction, that an absolute bar on FERC's jurisdiction was intended by the statute (*id.* at 1406, 1408-10).

In *Arcadia*, this Court reversed the lower court's reading of Section 318 as "a general conflicts provision, policing the entire regulatory border between the two agencies." 111 S. Ct. at 421 (footnote omitted). The Court held that the phrase "or any other subject matter" in Section 318 belongs to the fourth and final category of subjects as to which SEC jurisdiction under PUHCA prevails over conflicting FERC jurisdiction under the FPA: "the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." *Id.* at 419. The Court observed that "[PUHCA and the FPA] subject[] some companies that transmit and distribute electric power to overlapping regulatory jurisdiction of both the SEC and of FERC." *Id.* at 417. Section 318 contains a "careful enumeration of subjects" (*id.* at 419), with the intent of resolving jurisdictional conflicts "within four areas of plainly parallel authority granted both to the SEC, under PUHCA, and to the FPC (FERC), under the FPA" (*id.*). These "areas of plainly parallel authority" do not include Section 13(b) of PUHCA *or* Sections 205 and 206 of the FPA. *Id.* at 419-20. Moreover, the Court specifically held that when FERC disallowed in Ohio Power's rates a portion of the price it paid to SOCCO for coal, it was *not* regulating the same "subject matter" as Ohio Power's acquisition of SOCCO or of coal (*id.* at 422 & n.3), even if Section 318 were construed as applying to requirements "imposed 'with respect to the disposition' of electric power" (*id.* at 422).

The Court then remanded for the lower court to consider

> the argument that the FERC-prescribed rate is not "just and reasonable" because it "traps" costs which the government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO.

Id. (citation omitted).

On remand, the same panel of the lower court adhered to its view that in Section 13(b) of PUHCA, "Congress has granted the SEC alone the authority to establish prices charged by [registered holding company] associates for goods." *Ohio Power II*, 954 F.2d at 786 (Arcadia Pet. App., 14a).[7] The court reiterated its earlier conclusion that FERC ratemaking is regulation of the same subject matter that is delegated to the SEC by Section 13(b): "the economic relationship between Ohio Power and SOCCO," *id.* at 784 (Arcadia Pet. App., 11a), and that the only way to prevent the "trapping" of costs is to construe Section 13(b) as ousting FERC of ratemaking jurisdiction under FPA Sections 205 and 206:

> [W]e hold that Congress in § 13(b) of the PUHCA authorized the SEC to set the price of SOCCO coal "at cost," and in so doing constrained FERC from altering that price under its "just and reasonable" rate-setting authority.

Id. at 785 (Arcadia Pet. App., 12a).

The lower court simply failed to address the question posed to it by this Court: whether "the FERC-prescribed rate is not '*just and reasonable*' because it 'traps' costs which the government itself has approved." *Arcadia*, 111 S. Ct. at 422 (emphasis supplied). On remand, the lower court should have considered whether FERC gave appropriate weight to Ohio Power's legitimate expectations in light of the actual scope of the SEC's review of its activities. Of course, FERC's ratemaking determinations under FPA Sections 205 and 206 must be supported by substantial evidence of record[8] and must not be arbi-

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[7] In *Ohio Power I*, Judge Mikva disagreed with the majority's jurisdictional ruling, but concurred in the judgment because he concluded that FERC had violated one of its fuel adjustment clause regulations. 880 F.2d at 1410-14. In *Ohio Power II*, however, the panel's opinion was unanimous.

[8] Section 313(b) of the FPA, 16 U.S.C. § 825*l*(b).

trary or capricious or an abuse of discretion.[9] Instead of reviewing FERC's setting of just and reasonable rates under these well-established principles of administrative law, the lower court construed another statute to "constrain[] FERC from altering [the] price [paid by Ohio Power to SOCCO] under its 'just and reasonable' rate-setting authority." *Ohio Power II*, 954 F.2d at 785 (Arcadia Pet. App., 12a).

Having concluded that FPA Section 318 did not limit FERC's jurisdiction to determine the extent to which it would be just and reasonable to include in wholesale electric rates Ohio Power's payments to SOCCO, this Court did not remand the case to the D.C. Circuit to consider whether FERC should be ousted of ratemaking jurisdiction by means of a different statutory provision. The lower court declared that its reading of PUHCA Section 13(b) as limiting the reach of FPA Sections 205 and 206, like its reading of FERC's fuel adjustment clause regulation,[10] "provides Ohio Power with . . . succor from the 'overlapping regulatory jurisdiction of both the SEC and of FERC' found by the *Arcadia* Court." 954 F.2d at 784 (Arcadia Pet. App., 10a) (quoting *Arcadia*, 111 S. Ct. at 415). This Court, however, did not hold that the "overlapping regulatory jurisdiction" created by Congress was a *problem*, to be resolved by ousting FERC of ratemaking jurisdiction over the inclusion of costs of inter-affiliate transactions in electric rates. To the contrary, *Arcadia* held that ratemaking regulation of Ohio Power is not regulation of the same subject matter as Ohio Power's acquisition of SOCCO or its purchase of coal from SOCCO. 111 S. Ct. at 422 & n.3. *See also id.* at 423 (Stevens, J., concurring) ("The [SEC's and FERC's] requirements limit Ohio Power's financial relationships

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[9] Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

[10] *See* pages 16-18, *infra*.

with different parties—its supplier and its customers. The two requirements also concern different aspects of fuel costs—the amount Ohio Power must pay for its fuel and how much of those fuel costs it can recover directly from its customers.").

b. The lower court's interpretation of PUHCA Section 13(b) undermines this Court's interpretation of FPA Section 318, which is the one provision in the Public Utility Act of 1935 that expressly addresses "[c]onflict[s] of [j]urisdiction" (16 U.S.C. § 825q) between the SEC and FERC. *Arcadia* established that Section 318 is not "a general conflicts provision, policing the entire regulatory border between the two agencies," 111 S. Ct. at 421 (footnote omitted), and that it does not limit FERC ratemaking jurisdiction in the event of alleged conflicts with SEC jurisdiction under PUHCA Section 13(b). Although the lower court claimed it was relying on "the plain language" of Section 13(b),[11] that provision, unlike FPA Section 318, makes no mention of FERC jurisdiction. Moreover, the language of PUHCA Section 13(b) is very different from the language of FPA Sections 205 and 206. The latter provisions articulate a comprehensive ratemaking scheme; Section 13(b) does not. *Compare* 16 U.S.C. §§ 824d and 824e *with* 15 U.S.C. § 79m(b). The lower court's statutory interpretation actually is premised on its policy determination that "the economic relationship between Ohio Power and SOCCO" should be regulated by one rather than two federal agencies. 954 F.2d at 784 (Arcadia Pet. App., 11a). This was the same policy on which the court previously relied for its expansive application of Section 318 to the FERC order at issue. *Ohio Power I*, 880 F.2d at 1406, 1408-10.

The lower court's sweeping approach to statutory interpretation, unless reversed, would render this Court's interpretation of Section 318 a nullity. In *Arcadia*, the

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[11] *Ohio Power II*, 954 F.2d at 784 (Arcadia Pet. App., 11a).

Court rejected the ruling in *Ohio Power I* that the words "or any other subject matter" in Section 318 constituted a catch-all category, because this would "render[] the section's careful enumeration of subjects superfluous." 111 S. Ct. at 419. Yet, the lower court has now relied on its own policy judgment to supplement Section 318 with an additional limit on FERC's jurisdiction. A statutory scheme of overlapping SEC and FERC jurisdiction, in which the SEC's jurisdiction is stated to be paramount as to several "careful[ly] enumerat[ed] . . . subjects," *id.*, does not permit lower courts to imply, on the basis of their policy preferences, additional limits on the jurisdiction of one agency.

c. In *Arcadia*, the Court adopted a reading of Section 318 which was "confirmed by long-time understanding and practice" (111 S. Ct. at 420), including 50 years of FPC and FERC decisions under that provision (*id.* at 420-21). *Ohio Power II*'s holding that PUHCA Section 13(b) divests FERC of ratemaking authority under FPA Sections 205 and 206 is as inconsistent with the half century of agency administration of those provisions as was *Ohio Power I*'s interpretation of Section 318. IMPA's counsel are aware of no FERC, FPC or SEC decisions which have interpreted Section 13(b) or Sections 205 and 206 as they have now been interpreted on remand. All of the cases are to the contrary.

Prior to the development of the market-price test that was applied to Ohio Power, FERC's predecessor, the FPC, required public utilities to eliminate from their books and their rates excessive payments made to supplier affiliates. The FPC's "no profits to affiliates" rule was applied to operating utilities within holding company systems, even though sales to such utilities by affiliated service companies and fuel suppliers were subject to regulation by the SEC under PUHCA. *E.g.*, *California Oregon Power Co. v. FPC*, 150 F.2d 25, 27-28 (9th Cir. 1945), *cert. denied*, 326

U.S. 781 (1946).[12] In *McDowell County Consumers Council, Inc. v. American Electric Power Co.*, 54 F.P.C. 361, 364 (1975), the FPC instituted an investigation into "[t]he reasonableness and prudence of AEP's and its affiliate's coal purchase policies and practices as well as all factors influencing or affecting the delivered price of coal" whether purchased from affiliates or non-affiliates. The FPC stated (*id.* at 363):

> APCO [Appalachian Power Company, an AEP operating company subsidiary] contends that the prices charged for coal by affiliated companies is [sic] subject to the regulation of the SEC. The investigation herein instituted is for the purpose of fulfilling this Commission's statutory obligation as expressed [*inter alia*] in Sections . . . 205 [and] 206 . . . of the Federal Power Act which are in no way repugnant to the exercise of any authority which the SEC may choose to assert under its statute.

In a 1975 letter, Chairman Nassikas of the FPC responded to inquiries by the Chairmen of two Subcomittees of the Senate Committee on Government Operations, regarding the respective jurisdictions of the FPC and the SEC "where owned or controlled fuel sources exist within a registered public utility holding company system." *The Utilities Act of 1975: Hearings on S. 594 Before the Subcomm. on Intergovernmental Relations and the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 500, 515 (1975) (letter of FPC Chairman John N. Nassikas to Senator Lee Metcalf dated May 15, 1975). Chairman Nassikas specifically noted, as an example, the captive coal mining operations of Ohio Power and other

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[12] The FPC originally developed the "no profits to affiliates" rule in the early 1930's, in regulating hydroelectric licenses under the Federal Water Power Act of 1920 (now Part I of the FPA). After the enactment of the Public Utility Act of 1935, the FPC applied this rule to the regulation of interstate electric utilities. *California Oregon Power Co. v. FPC*, 150 F.2d at 27.

AEP operating company subsidiaries. *Id.* at 516-17. He explained the respective jurisdictions of the FPC and SEC as follows:

> Concerning fuel prices from owned or controlled coal producing subsidiaries or affiliates, *the SEC exercises threshold jurisdiction of a transactional nature.* That is the SEC, pursuant to Section 13(b) of the PUHC Act, 15 U.S.C. 79m(b), is authorized to prescribe rules and regulations which permit the creation of and contracting by fuel producing subsidiaries within the holding company system.
>
> * * * *
>
> The SEC does not regard its authority as extending to regulation of the rates charged by a utility company for the electricity it sells at retail or wholesale, and accordingly *does not prescribe what effect shall be given, through a fuel adjustment clause or otherwise, to the elements of cost in the intercompany transactions determined under the PUHC Act.* Fuel costs for ratemaking purposes are governed by the relevant state and federal rate regulatory agencies, including this Commission.
>
> I must emphasize that this Commission and SEC have long endeavored to resolve conflict of jurisdiction issues on an informal basis. *This inter-agency cooperation is indicative of the mutual respect for the relative expertise which our two sister agencies hold for one another.*

Id. at 517-19 (emphasis supplied; footnote omitted).

Chairman Nassikas' statements about the SEC's views of its jurisdiction are consistent with the SEC's orders and decisions. That agency has concluded that its jurisdiction to approve requests to establish or reorganize fuel supplier affiliates does not affect the jurisdiction of FERC or the FPC (or the jurisdiction of the appropriate state retail ratemaking authority) to protect ratepayers from excessive inter-affiliate fuel prices. *E.g., Central and South West Fuels, Inc.*, HCAR No. 23876, 34 S.E.C.

Docket 500, 503 (Oct. 23, 1985). The SEC has observed that interested parties could seek relief under Section 13(b) in the future from above-cost prices paid to affiliates for coal, *or* petition the appropriate ratemaking authorities to scrutinize the inter-affiliate transactions in setting rates, *or* both. *The North American Co.*, 29 S.E.C. 521, 537 n.26 (1949); *Appalachian Electric Power Co.*, 27 S.E.C. 1029, 1034-35 (1948). *See also Georgia Power Co.*, HCAR 23448, 31 S.E.C. Docket 621, 623, 624 (Oct. 10, 1984) (SEC jurisdiction under Section 13(b) over inter-affiliate supply of construction services did not limit review of retail rates by the Georgia Public Service Commission).

The lower court has suggested that FERC jurisdiction to disallow a portion of the payments to SOCCO in Ohio Power's rates would exist, if at all, only if the SEC had granted an exemption under Section 13(b). 954 F.2d at 785 n.5 (Arcadia Pet. App., 12a); *see also Ohio Power I*, 880 F.2d at 1407, 1408. However, in *New England Electric System*, HCAR 22309, 24 S.E.C. Docket 298 (Dec. 9, 1981), the SEC concluded that it could exempt a proposed joint venture to construct and operate coal transportation facilities from Section 13(b) without harming consumers because FERC's ratemaking authority was *independent* of Section 13(b). 24 S.E.C. Docket at 307-08. The SEC stated that FERC had the authority to "include the entire cost of transportation . . . , if FERC should determine that it is just and reasonable, or some other amount." *Id.*[13]

Even as to subject matters which are within the scope of FPA Section 318—security issuances and other securities transactions, and acquisitions and dispositions of facilities and other assets by and among registered holding

[13] The lower court misread this case when it concluded, in *Ohio Power I*, that in *New England Electric System* the SEC may have been stating that FERC would have jurisdiction *because* the SEC was granting a Section 13(b) exemption. 880 F.2d at 1407.

company affiliates [14]—the SEC has recognized that PUHCA was not intended to supplant FERC's responsibility to ensure that rates reflect only the costs of reasonable utility operations. For instance, the SEC frequently has declared that the reasonableness of a construction program or of a particular allocation of construction costs among operating utilities is a matter within the jurisdiction and expertise of the FPC/FERC (or the appropriate state commission, with regard to a utility's retail rates). *Georgia Power Co.*, 31 S.E.C. Docket at 624; *Georgia Power Co.*, HCAR No. 23330, 30 S.E.C. Docket 934, 935-36 (June 15, 1984); *The Southern Company*, HCAR No. 21665, 20 S.E.C. Docket 799, 801-02 (July 24, 1980); *Georgia Power Co.*, HCAR No. 18750, 5 S.E.C. Docket 24, 25 (Dec. 31, 1974). *See Arcadia*, 111 S.Ct. at 423 (Stevens, J., concurring) (discussing the SEC's and FERC's respective fields of expertise).

d. Even apart from its inconsistency with *Arcadia* and with SEC and FERC/FPC administration of PUHCA and the FPA, the lower court's opinion should be reviewed because it has misapplied the "field preemption" rule promulgated by this Court in *Nantahala Power & Light v. Thornburg* and *Mississippi Power & Light v. Mississippi*, *supra* note 6. Those cases teach that a state is preempted from disallowing, in retail rates, the price of wholesale electric power, and power costs allocated among affiliated companies by means of wholesale power agreements, because those costs are regulated by FERC, a Federal *ratemaking* agency, under the FPA. The SEC's role under PUHCA is not analogous to FERC's role under the FPA. In the Public Utility Act of 1935, Congress delegated to FERC (then the FPC) jurisdiction over wholesale electric rates and services. Although jurisdiction over retail electric rates and services was left to the states, they were not authorized to disallow costs already subject to FERC's ratemaking jurisdiction at a

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[14] *Arcadia*, 111 S. Ct. at 419-20.

prior stage of the economic process of producing, transmitting and distributing electricity. The SEC, by contrast, is not a ratemaking agency.[15] *Ohio Power II* has turned *Nantahala* and *Mississippi* on their heads by reducing FERC's role from preeminent regulator of electric rates and services to a litigant in proceedings before the SEC. The lower court dismissed Justice Stevens' concerns about a regulatory gap[16] by declaring that "FERC may attempt to affect the price-approval process" by submitting comments in SEC proceedings or by petitioning the SEC to initiate an investigation. 954 F.2d at 786 (Arcadia Pet. App., 14a). Such a drastic restructuring of the regulatory process hardly is required to protect the legitimate expectation interests of Ohio Power and of AEP investors. FERC's statutory mandate to ensure that utility rates are just and reasonable obligates it to balance the interests of consumers and investors. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1949). Ratemaking decisions of FERC can be reviewed by the courts to ensure that they are supported by substantial evidence and are not arbitrary or capricious or an abuse of discretion. 16 U.S.C. § 825*l*(b); 5 U.S.C. § 706(2)(A).

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[15] FERC's exclusive jurisdiction over wholesale electric transactions is established by the "filed rate doctrine," which provides that a FERC-filed tariff for wholesale electric rates binds the affected utilities, and state and Federal governmental bodies (including FERC itself), unless and until the tariff is modified by FERC. *Nantahala Power & Light v. Thornburg*, 476 U.S. at 962-67; *Mississippi Power & Light v. Mississippi*, 487 U.S. at 371-72. The filed rate doctrine is inapplicable to Section 13(b) of PUHCA. That provision, and the SEC's rules, do not establish a system of filed tariffs and rate review. *Ohio Power I*, 880 F.2d at 1408. By contrast, the FPA requires utilities to file tariffs specifying their wholesale electric rates and services, and all contracts affecting those rates and services. 16 U.S.C. § 824d(c) and (d). The FPA also provides for public notice, FERC review of the reasonableness of tariffs and contracts filed, and refund protection from excessive rates. 16 U.S.C. §§ 824d(e) and 824e.

[16] *Arcadia*, 111 S. Ct. at 423-24.

2. An independent ground for the lower court's decision to vacate the FERC order under review was its interpretation of FERC's fuel adjustment clause regulation, 18 C.F.R. § 35.14(a)(7). IMPA concurs with the petitioners that this ruling should not insulate the lower court's jurisdictional holding from review. IMPA also agrees with the petitioners that the court's interpretation of Section 35.14(a)(7) is erroneous and presents independent grounds for the issuance of a writ of certiorari.

Section 35.14(a)(7) provides, *inter alia*:

> Where the utility purchases fuel from a company-owned or controlled source, the price of which is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable in the adjustment clause.

The lower court rejected FERC's contention that that word "deemed" was meant to be a rebuttable rather than conclusive presumption, even though FERC and the FPC have consistently adopted that interpretation in their administration of the regulation. The court reasoned that "deemed" was unambiguous because "courts construing the word 'deemed' have *generally* found that it establishes a conclusive presumption." *Ohio Power II*, 954 F.2d at 783 (Arcadia Pet. App., 8a), quoting *Ohio Power I*, 880 F.2d at 1413 (Mikva, J., concurring in the judgment) (emphasis supplied). This reasoning is a *non sequitur*. There is no black-letter rule of law that "deemed" *always* creates a conclusive or irrebutable presumption.

> The words "deem" and "deemed" when used in statutes have been construed to establish a conclusive presumption in some instances, but only a rebuttable presumption in other cases, depending largely upon the context in which they are used.

Brimm v. Cache Valley Banking Co., 269 P.2d 859, 863 (Utah 1954) (citation omitted). How courts *generally* construe the word "deemed" does not justify forcing on

FERC an interpretation of one of its own regulations which flies in the face of the agency's consistent administration of that regulation.

The agency interpretation rejected by the lower court is no recent invention. Less than a year after the regulation was promulgated by FPC Order No. 517,[17] the FPC initiated an investigation of allegations that an operating subsidiary of AEP was passing excessive inter-affiliate fuel costs through its fuel adjustment clause. *McDowell County Consumers Council, Inc. v. American Electric Power Co., supra.* The FPC declared that the investigation would include inter-affiliate purchases which its recently-enacted regulation had "deemed" reasonable: "The coal contracts subject to this investigation shall include all coal contracts whether or not required to be submitted pursuant to Commission Order No. 517." 54 F.P.C. at 365 n.4.[18] The FPC also distinguished its obligation under FPA Sections 205 and 206 from SEC regulation under PUHCA. *Id.* at 363.

In a letter responding to inquiries from two Senate Subcommittes, FPC Chairman Nassikas—who also was Chairman when the fuel clause regulation was promulgated in 1974[19]—stated that Section 35.14(a)(7) creates a "presumption of reasonableness as to [the] price [of fuel]" when the price is subject to the jurisdiction of another agency. *The Utilities Act of 1975: Hearings on S. 594 Before the Subcomm. on Intergovernmental Relations and the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Opera-*

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[17] *Fuel Adjustment Clauses in Wholesale Rate Schedule*, 52 F.P.C. 1304 (1974).

[18] 18 C.F.R. § 35.14(a)(7), promulgated by FPC Order No. 517, requires that affiliate fuel contracts be filed with the FPC (now FERC) when they are not subject to other regulatory authority.

[19] *Fuel Adjustment Clauses in Wholesale Rate Schedule*, 52 F.P.C. at 1304.

tions, at 514. In his concurrence to the judgment reversed in *Arcadia*, Judge Mikva stated that Chairman Nassikas' letter did not "specify[] whether the presumption is rebuttable or conclusive." 880 F.2d at 1414. However, Chairman Nassikas referred, in the same letter, to the allegations of excessive inter-affiliate coal purchases by the AEP system which the FPC was investigating. *Hearings* at 506. He also referred to the SEC's jurisdiction under PUHCA Section 13(b) as "threshold jurisdiction of a transactional nature," *id.* at 517, and added:

> The SEC does not regard its authority as extending to the regulation of the rates charged by a utility company for the electricity it sells at retail or wholesale, and accordingly does not prescribe what effect shall be given, through a fuel adjustment clause or otherwise, to the elements of cost in the intercompany transactions determined under the PUHC Act. Fuel costs for ratemaking purposes are governed by the relevant state and federal rate regulatory agencies, including this Commission.

Id. at 518. Thus, when it promulgated the regulation, the FPC could not have thought that it was establishing a conclusive presumption that transactions were reasonable if they were subject to SEC regulation under PUHCA.

Finally, IMPA submits that the Commission's ability to amend its regulation in the future, if this Court reverses the lower court's jurisdictional holding, would provide inadequate protection from excessive costs of inter-affiliate transactions. Unless the lower court's interpretation of Section 35.14(a)(7) as currently written is reversed, future amendment of the regulation would not protect utility customers from excessive fuel costs that had been charged to them in the meantime.

CONCLUSION

The petitions of Arcadia, Ohio, *et al.* and of the Federal Energy Regulatory Commission for writs of certiorari should be granted.

Respectfully submitted,

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September 11, 1992

APPENDIX

APPENDIX

APPENDIX

FEDERAL ENERGY REGULATORY COMMISSION

Washington, D.C. 20425

CHAIRMAN

April 9, 1992

Honorable Philip R. Sharp
House of Representatives
Washington, DC 20515

Dear Mr. Sharp:

Thank you for your letter of February 11, 1992, concerning the status of the proceedings in *Indiana and Michigan Municipal Distributors Association and City of Auburn, Indiana v. Indiana Michigan Power Company*, Docket No. EL88-1-000, and *Indiana Michigan Power Company*, Docket Nos. ER88-31-000 and ER88-32-000.

In Docket No. EL88-1-000 (the complaint proceeding), the Indiana Municipal Power Agency (Power Agency) claims that Indiana Michigan Power Company (Indiana Michigan) overpaid for coal burned at its Breed and Tanners Creek 4 generating facilities, and for coal transportation facilities (railcars, towboats, barges and a rail-to-barge transloading facility known as the Donald C. Cook Coal Terminal) operated by Indiana Michigan in association with other corporate affiliates, and that these overpayments resulted in unjust and unreasonable rates for Indiana Michigan's wholesale customers.

In Docket Nos. ER88-31-000 and ER88-32-000 (the rate proceedings), the Power Agency opposes Indiana Michigan's proposed rate increases to three municipal-owned electric systems in Indiana which are members of the Power Agency. Other wholesale customers of Indiana Michigan initially participated in the complaint and rate proceedings, but then settled with the company and are no longer participants.

The Commission initially consolidated the complaint and rate proceedings and set them for hearing. The presiding administrative law judge, however, divided the proceedings into a rate phase (Phase I) and a complaint phase (Phase II) because of procedural delays in the complaint proceeding. On November 20, 1989, the presiding judge issued an initial decision in Phase I, finding that the proposed rate increases were not shown to be just and reasonable in part. *Indiana Michigan Municipal Distributors Association and City of Auburn, Indiana v. Indiana Michigan Power Company*, 49 FERC ¶ 63,020 (1989). Subsequently, on June 7, 1990, the presiding judge issued an initial decision in Phase II, finding a violation of a settlement agreement and overpayments of certain transportation costs. *Indiana Municipal Distributors Association and City of Auburn, Indiana v. Indiana Michigan Power Company*, 51 FERC ¶ 63,019 (1990).

Both the Phase I (rate) and Phase II (complaint) proceedings are now pending on exceptions to the presiding judge's initial decisions.

The Phase I (rate) proceeding contains numerous complicated cost-of-service issues. The Commission is currently considering the merits of this proceeding, and expects to consider a final decision in the late spring.

Issuance of a final opinion disposing of the exceptions in the Phase II complaint proceeding, however, is complicated by a jurisdictional allocation issue between this Commission and the Securities and Exchange Commission (SEC) over which agency has jurisdiction to regulate certain transactions between subsidiaries of registered electric utility holding companies. Because Indiana Michigan is a wholly-owned subsidiary of the American Electric Power System (AEP), it is subject to regulation by both the SEC under the Public Utility Holding Company Act of 1935 (PUHCA), and this Commission under the Federal Power Act.

The latest aspect of this jurisdictional issue involves an opinion by the United States Court of Appeals for the District of Columbia Circuit, *Ohio Power Company v. FERC*, No. 88-1293 (D.C. Cir. Feb. 4, 1992), which, on remand from the Supreme Court in *Arcadia v. Ohio Power Company*, 111 S.Ct. 415 (1991), specifically held that section 35.14(a)(7) of this Commission's regulations (18 C.F.R. § 35.14(a)(7) (1991)), requires this Commission to defer to SEC rulings concerning prices paid by an AEP affiliate for coal from a second AEP affiliate. This decision has potential ramifications for the Phase II complaint proceeding because: (a) the SEC participated in the settlement the judge found was violated (the settlement proceeding involved the reasonableness of rates for coal supplied to an AEP electric company subsidiary from AEP-controlled mining facilities in Utah); and (b) the SEC issued rulings pertaining to costs of the transportation at issue in Phase II, which involved arrangements between AEP affiliates. If the D.C. Circuit's latest opinion is left unchanged, it is conceivable that the Commission may be without jurisdiction to resolve the issues in Phase II.

In view of this, I am unable, at this time, to determine when the Commission will be able to issue a final opinion in Phase II.

A copy of your letter and this response have been placed in the public files in Docket No. EL88-1-000, *et al.* If I can be of any further assistance to you in this or any other Commission matter, please do not hesitate to contact me.

Yours truly,

/s/ Martin L. Allday
MARTIN L. ALLDAY

Supreme Court, U.S.
FILED
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(7)

No. 92-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

1. Ohio Power's attempt to re-write, and thereby implicitly disavow, the central holding of the court of appeals on remand is as disingenuous as it is unavailing. Contrary to the repeated assertion, the decision below did not simply "turn[] on the meaning of four SEC orders . . . of no general legal significance." Opp. at 3, 17 (citations omitted). Nor is it true that the lower court engaged strictly in a "cost-trapping" analysis that "did not rest on [§ 13(b) of PUHCA], or even on the SEC's regulations implementing it." Opp. at 17.

The court of appeals could not have made plainer that, in its view, reversal of the FERC's rate determination was required not because of the language of four SEC staff orders, but because of "the plain language of the *statute* authorizing the SEC to regulate sales contracts of associate companies[,] Section 13(b) of the PUHCA." Pet. App. 11a (emphasis added). The court of appeals resolved the conflict it perceived between the regulatory efforts of the FERC and the SEC by looking to "the SEC's specific *statutory* mandate" and by concluding that it was a more "specific articulation of [Congress's] policies and preferences" than the FERC's "general charge to establish 'just and reasonable' wholesale electric rates." *Id.* (emphasis added). Based on its examination of these *statutory* provisions, the court explicitly held

> that Congress *in § 13(b) of the PUHCA* authorized the SEC to set the price of SOCCO coal "at cost," and *in so doing constrained FERC from altering that price under its "just and reasonable" rate-setting authority.*

Id. at 12a (emphasis added). Lest there be any doubt, the court below restated the statutory basis of its decision just two pages later, "hold[ing] that the SEC properly discharged its authority under § 13(b) of the PUHCA . . . and that FERC must respect this *specific grant of authority to the SEC.*" *Id.* at 15a (emphasis added).

Ohio Power's attempt to disguise the decision below as a straightforward application of the "cost-trapping" principles announced in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), founders on a simple fact that respondent completely ignores. Merely determining that two federal agencies are regulating activities in a manner that possibly results in trapped costs [1] simply raises, but does not answer, the question of which agency's authority is paramount. Because *Nantahala* and *Mississippi Power & Light* involved conflicts between federal and state agencies, the Supremacy Clause dictated that the states' regulatory efforts must yield. The Supremacy Clause, however, plays no role in resolving a "conflict" between two federal agencies. Accordingly, the court's determination that FERC cannot disallow inter-affiliate costs that are the subject of SEC staff orders necessarily rested on the court's judgment that § 13(b) of PUHCA always takes precedence over FERC's rate-setting authority under the FPA. That *holding* warrants this Court's review.

2. Not only is it impossible to disguise the sweep of the lower court's statutory ruling, it is equally impossible to reconcile that ruling with this Court's decision on remand in *Arcadia* v. *Ohio Power Co.*, 111 S. Ct. 415 (1990).

a. Respondent argues that, in its remand, this Court did nothing more than ask the lower court to apply the rationale of the cost-trapping prohibition developed in *Nantahala* and *Mississippi Power & Light*. Opp. at 19. But, as just noted, those cases, which involved state/federal conflicts, cannot determine the outcome of an intra-federal conflict—a fact this Court recognized through its "Cf." cite to *Nantahala*. See 111 S. Ct. at 422. More-

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[1] As petitioners demonstrate below, in fact the FERC's rate order does not trap any costs within the meaning of this Court's prior decisions. *See infra*, p. 3.

over, it is undisputed that the SEC staff orders did not require respondent to purchase a single ounce of coal from SOCCO. Accordingly, the essential predicate upon which this Court based its findings of cost trapping in *Nantahala* and *Mississippi Power & Light*—*mandatorily*-incurred costs that a subsequent regulator will not allow to be recouped—is wholly lacking here. See Pet. at 19-20.[2]

Rather than remand for the fashioning of a statutorily-based rule of cost-trapping preemption, this Court called on the lower court to determine whether the FERC-prescribed rate is not "just and reasonable" because it may "disregard[] a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO." 111 S. Ct. at 422. Such an inquiry should have focused on the extent to which FERC, in exercising its authority under Sections 205 and 206 of the FPA, could or should have departed from its comparable market test in light of any justifiable reliance Ohio Power may have placed on the SEC staff orders.[3] Instead, at Ohio Power's urging and over the objections of petitioners,[4] the court did

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[2] No doubt for these very reasons, the court of appeals itself made only one passing reference to just one of the two decisions that respondent now claims governed the disposition of this case on remand. *See* Pet. App. at 11a.

[3] As the municipalities noted in their petition, FERC did in fact consider respondent's reliance interest in the order under review here. *See* Pet. at 19 n.12.

[4] Among respondent's more egregious mischaracterizations is its contention that the lower court based its decision on the issues *petitioners* proffered below. The municipalities stated emphatically that "all arguments that the FERC's order is categorically barred by the statutory scheme [of PUHCA], are *beyond the scope of the Supreme Court's remand order.*" Intervenors' C.A. Brief at 7 n.5 (emphasis added). Similarly, contrary to respondent's suggestion (*see* Opp. at 19 n.18), the municipalities did argue below that § 13(b) does nothing more than authorize affiliate transactions that would otherwise be illegal, noting that "[w]hat section 13(b) actually does is prohibit all affiliate contracts unless they comply

not consider whether FERC had properly exercised its statutory authority, but rather concluded that FERC was stripped of that authority by virtue of § 13(b).

b. This ruling not only exceeded the scope of the remand, it is flatly inconsistent with this Court's decision in *Arcadia*. As petitioners previously explained (Pet. at 16-17), this Court determined that Section 318 of the FPA preempts FERC's authority *only* where the two agencies both regulate a subject matter falling within one of four specifically enumerated areas of plainly parallel authority under PUHCA and the FPA. See 111 S. Ct. at 419. It necessarily follows, therefore, that, to the extent other unidentified conflicts arise, FERC is not divested of its authority by virtue of any other parallel authority the SEC may possess under PUHCA.

Unable to dispute this reading of *Arcadia*, respondent attempts to belittle it, arguing that "a remand would have been pointless if there were any basis for the Municipalities' contention." Opp. at 21 n.20. But, to the contrary, it is the court of appeals' determination that § 13(b) ousts FERC of all authority over costs that rendered entirely "pointless" this Court's instruction to determine whether the "*FERC*-prescribed rate" (111 S. Ct. at 422 (emphasis added)) is "just and reasonable." [5]

3. The lower court's sweeping statutory ruling plainly warrants this Court's review. The decision below effectively eliminates FERC jurisdiction over the wholesale rate consequences of all inter-affiliate transactions involving the sale of goods or services. Respondent's repeated suggestion that the presence of SEC orders "pre-

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with conditions and limitations established by the SEC." Intervenors' C.A. Brief at 4.

[5] Indeed, Ohio Power admits elsewhere that, under the court of appeals' ruling, FERC is reduced from a prescriber of rates to an SEC enforcement adjunct. *See* Opp. at 23 (FERC retains authority "to ensure that the utility collects no more than the SEC-authorized price").

scribing" a cost-based standard somehow renders this case unique or minimizes the significance of the ruling below (see, *e.g.*, Opp. at 17-18 & n.17) is manifestly wrong. Under § 13(b), utilities cannot enter into inter-affiliate transactions unless they obtain SEC approval. Such approval, moreover, must, as in this case, "insure that [inter-affiliate] contracts are performed economically and efficiently for the benefit of such associate companies *at cost* . . . ." 15 U.S.C. § 79m(b) (emphasis added). It was on the strength of this statutory requirement—and not any SEC "determination" (see Opp. at 18 n.17)[6]—that the lower court read the SEC staff's orders as prescribing an "at-cost" pricing standard. See Pet. App. 14a (finding that the SEC orders "are better read as requiring Ohio Power to pay a price 'equal to cost' for SOCCO coal, *as prescribed by § 13(b)*") (emphasis added). Because staff orders routinely incorporate boilerplate references to this statutory language, the costs incurred in virtually all inter-affiliate transactions are, under the lower court's ruling, immune from FERC review in wholesale rate proceedings.

By immunizing such costs, which in this case account for 50 percent of the total cost of Ohio Power's wholesale electricity, the decision below re-opens precisely the same regulatory gap that moved this Court to review the court of appeals' prior opinion. Indeed, respondent's suggestion that "[t]he 'gap' of which Petitioners complain in fact

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[6] Respondent's description of the SEC staff orders as "determinations" and pricing "prescriptions" flies in the teeth of the lower court's earlier recognition that, in issuing the orders, the SEC staff conducted "no hearings and [made] no findings" (*Ohio Power Co.* v. *FERC*, 880 F.2d 1400, 1404 (D.C. Cir. 1989), *cert. granted*, 494 U.S. 1055 (1990)), and that none of the orders "describes any element of costs other than the cost of capital." *Id.* at 1408. Thus, there is nothing unique in the orders in this case that distinguishes them from any other inter-affiliate transaction approved by the SEC over the past 57 years—a fact that explains the presence as *amici* in this proceeding of the National Association of Regulatory Utility Commissioners and other state agencies that lack any immediate stake in the four SEC orders involved in this case.

is completely filled by the SEC" (Opp. at 22), is *precisely* the same argument it made in its unsuccessful opposition to the petition for review of the earlier decision. See Brief in Opposition, No. 89-1283, at 9 ("There is no gap, substantial or otherwise, because the SEC exercises plenary review over transactions between affiliates of a public utility holding company").[7] This Court properly rejected that argument last time, and should do so again here.

As petitioners have previously shown, the SEC's statutory mandate is far different from that of FERC. The SEC itself has repeatedly acknowledged that it has "no power over the [] dealings [of electric utilities regulated under PUHCA] with their customers, retail or wholesale." *American Elec. Power Co.*, 46 S.E.C. 1299, 1323 (1978).[8] Moreover, it has no expertise in setting or assessing wholesale electric rates; no statutory or administrative procedures by which customers can initiate a complaint[9]; and no clear authority to order refunds for overcharges if a utility is found to have violated its regulatory requirements. By contrast, under the decision below, FERC, which possesses the necessary regulatory expertise and powers, has been stripped of its core duty to prescribe rates and relegated to "advis[ing] the SEC of its views" and enforcing SEC cost prescriptions. Opp. at 23. This subversion of Congress' carefully crafted regulatory scheme clearly warrants further review.

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[7] *See also* Brief in Opposition, No. 89-1283, at 9 ("The issue in this case is not the creation of a 'regulatory gap'; the SEC regulates transactions between affiliates in holding companies").

[8] *Accord In re Louisiana Power & Light Co.*, 26 S.E.C. Docket 1257, 1263 (1982); *In re New England Elec. Sys.*, 24 S.E.C. Docket 229, 235 (1981); *Arkansas Power & Light Co.*, 45 S.E.C. 567, 574 (1974).

[9] Contrary to respondent's suggestion (*see* Opp. at 24 n.24), § 18(b) of PUHCA does not provide for initiation of investigations at the behest of customers, nor does it grant the SEC the authority to investigate the propriety of wholesale rates.

4. Equally flawed is respondent's suggestion that review of the important issues raised by the decision below can be postponed until FERC "clear[s] away the impediment posed by its own regulation"—*i.e.*, Section 35.14(a)(7). Opp. at 13. This argument depends on respondent's mischaracterization of the decision below as a narrow, transaction-specific cost-trapping determination. In fact, because the court of appeals announced a broad statutory ruling that effectively precludes FERC from reviewing the wholesale rate consequences of all inter-affiliate transactions subject to SEC approval under § 13(b), FERC has absolutely no reason to revise its regulation. Indeed, respondent's suggestion that the statutory issue petitioners proffer may arise in another case rests on the remarkable supposition that FERC will revise its regulation and then, in open defiance of the District of Columbia Circuit, disallow precisely those costs that the court has ruled FERC lacks authority to review. The suggestion is absurd and ignores FERC's decision to petition for certiorari. Because FERC is expected to abide by the decisions of the D.C. Circuit, the statutory question raised by the decision below will escape review altogether if not addressed in this case.

5. In any event, the independent basis for the lower court's ruling is patently erroneous and independently worthy of review.

a. Ohio Power argues that the court of appeals correctly held that § 35.14(a)(7) conclusively prevents FERC from disallowing fuel charges that are based on costs subject to SEC jurisdiction. Respondent defends this regulatory interpretation based on the "weight of authority" construing the word "deemed" in entirely different contexts. But this argument skips over a prior essential step in the interpretive process, which is to determine the ordinary meaning of the term. No dictionary defines "deem" to include a conclusive determination. Instead, its conventional meaning is "to come to think or judge." Webster's Dictionary 332 (9th ed. 1984).

The term does not denote an irrebuttable conclusion, but simply the forming of an opinion. It is inherently ambiguous on the question of whether a "deemed" fact may be subject to reevaluation.

Thus, Ohio Power must demonstrate that the inherently ambiguous meaning of the term has been rendered completely unambiguous by judicial interpretation. This is a burden Ohio Power cannot even begin to shoulder. The rule is clear that the term has different meanings depending on the context in which it is used.[10] As petitioners have demonstrated previously, however, the relevant phrase is not merely the word "deemed," but FERC's use of the phrase "deemed to be reasonable and *includable*." 18 C.F.R. § 35.14(a)(7) (emphasis added). Because this phrase does *not* track the statutory definition of legal rates—*i.e.*, those that are "just and reasonable"—it cannot give rise to the conclusive presumption of legality that the court below found.

Respondent, moreover, does not even attempt to reconcile the lower court's interpretation with FERC's longstanding practice of investigating costs passed through fuel adjustment clauses (see Pet. at 22 & n.15) or with FERC's mandate, under § 205(f) of the FPA, to "cease any practice in connection with the [fuel adjustment]

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[10] Although interpretations of the term "deem" in unrelated statutes provide little, if any, guidance as to its meaning in other contexts, it is worth noting that respondent's description of the weight of authority is inaccurate. Respondent relies on *H.P. Coffee Co.* v. *Reconstruction Fin. Corp.*, 215 F.2d 818 (Emer. Ct. App. 1954), for the proposition that courts have "almost unanimous[ly]" construed the term to create a conclusive presumption. One year earlier, however, the Supreme Court of Utah explained that " 'deem' and 'deemed' when used in statutes have been construed to establish a conclusive presumption in some instances, but only a rebuttable presumption in other cases, depending largely upon the context in which they are used," and went on to find a rebuttable presumption in the statute before it. *Brimm* v. *Cache Valley Banking Co.*, 269 P.2d 859, 863 (Utah 1953). Nor has respondent accounted for such findings in more recent decisions. *See, e.g., D&B Coal Co.* v. *Farmer*, 613 S.W. 2d 853, 854 (Ky. 1981).

clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause." 16 U.S.C. § 824d(f)(3). Nor can respondent offer any plausible explanation for why FERC would have unilaterally divested itself of all jurisdiction to review what is often the largest component of fuel costs. Its suggestion that FERC would choose "to 'abide by the determination' of another agency that has passed on the price paid in an affiliate fuel transaction" (Opp. at 15 n.12 (citation omitted)) ignores the fact that the regulation applies whenever the affiliate price is simply "subject to the jurisdiction of [another] regulatory body" (18 C.F.R. § 35.14(a)(7)), and thus is not limited to instances in which another agency has actually made any determination. More importantly, because the SEC does not make *rate* determinations, FERC has no reason to presume that SEC-approved costs will *invariably* yield just and reasonable wholesale rates.[11]

Finally, respondent fails to explain how a conclusive presumption comports with the final sentence of the regulation, which provides that FERC may investigate and suspend fuel adjustment clauses when "[f]uel charges by affiliated companies . . . do not appear to be reasonable." 18 C.F.R. § 35.14(a)(7). Respondent's contention that this sentence applies only to affiliate purchases that are not subject to regulatory authority (Opp. at 15 n.12) ignores the penultimate sentence, which already provides for suspension of rates resulting from contracts that are not subject to regulatory authority. Indeed, the last sentence carefully omits the reference to

[11] This case illustrates the point as well as any. Here the SEC approved financing transactions between 10 and 20 years ago with boilerplate "at cost" language in the staff's orders. Those orders did not require any coal actually to be purchased by Ohio Power from SOCCO. The idea that this sort of review is designed to provide consumers of electricity with assurances that their rates are just and reasonable is absurd on its face.

"such contracts" that appears in the two earlier sentences dealing with such situations.

b. Contrary to respondent's claim, the lower court's misreading of FERC's regulation does have broad significance. Not only does this regulatory ruling place in jeopardy the municipalities' recovery of millions of dollars in electric charges that FERC has declared unjust and unreasonable, it represents a transparent attempt by a reviewing court to impose a policy judgment on an agency that has, for eminently sound reasons, chosen to make a different policy choice. Judicial deference to agency interpretations is at its greatest when the agency construes its own policy-based regulation. Cf. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (noting heightened deference where agency interpretation of a statute requires "reconciling conflicting policies") (citation omitted). Plainly distrustful of FERC's ability to determine the weight to be accorded the SEC staff orders and any reliance Ohio Power may have placed on them, the court of appeals has instead interpreted FERC's own regulation (along with two statutory provisions) to strip the agency of its broad powers under Sections 205 and 206 of the FPA to set just rates. This extraordinary attempt to override an agency's authority—which is most starkly revealed in the lower court's tortured analysis of § 35.14(a)(7)—involves far more than an insignificant dispute over the meaning of a rarely-litigated regulation. It involves a fundamentally flawed method of judicial review of an agency regulation that clearly warrants review by this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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